JOTI JOURNAL

(BI-MONTHLY)

DECEMBER 2020

MADHYA PRADESH STATE JUDICIAL ACADEMY

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

EDITORIAL

Esteemed Readers,

This year could not come to a close any sooner.

A year that brought the world to a standstill, all at once sparing no one. It began with the catastrophic bushfire in a diminutive area of the world followed by the deadly Corona Virus outbreak which quickly engulfed the world contaminating over 82.6 million people and taking away over 1.8 million lives. The period of the last twelve months is one that will be forever etched in history as one of the darkest periods of mankind and will remain in the memories of every single human being on this planet. Not only will it remain in the memories of the ones who lost their loved ones and lived through it, but for all future generations as well.

As this year draws to a close, in many ways it is a relief to bid adieu to the upheaval of 2020. It is not just the end of a year but also the culmination of a decade of 2020. Thus, besides the controversy as to when a decade begins and ends, we may revive that we were fortuitous to have an opportunity of celebrating the sesquicentennial birth anniversary of three great men of our country viz. Rabindranath Tagore (1861), Swami Vivekananda (1863) and Mahatma Gandhi (1869) in the decade of 2020. These men of honour have left footprints in the legacy of their insight defining the very form of their medium, like art & culture, spirituality and truthfulness. The lessons these great men chose to seek has helped us spring into action in adverse situations and will continue to inspire us.

As we flip the pages of the calendar to a new year, we should recognize the opportunities that lie before us. With ingenuity, creativity and hard work, we rose to the challenges of a completely different year of experiments, innovations and inclusions from an academic institution. The pandemic continues to be the cause of change in various methodologies we have employed throughout the years. We are living in the age of information, where anyone who has the drive to learn can access that information conveniently, like never before. Despite the pandemic having the potential of being a devastating blow to the format of traditional learning, we were able to overcome the obstacles posed by the epidemic by tapping into the multitudinous prowess that information technology has to offer to us and conduct the programmes through online modes. The attempt was considered to be a resounding success after overwhelming feedback from the participants.

The Academy, during this year organized 34 educational and training programmes for the Judges of the District Judiciary as well as other stakeholders out of which 23 programmes were conducted online and through other modes of telecommunication. In all, 2462 Judges participated in these programmes wherein 1954 Judges attended the programmes online. The Academy in its maiden venture, imparted training to 40 Bangladesh Judges. Also conducted workshops for the Advocates, Panel Lawyers and training programmes for the ministerial staff of the District Judiciary at District Headquarters.

The herculean changes made this year in the way we train our Judges could have only witnessed the success it does today with the efforts of the participants at their end in enforcing these changes with the level of precision and accuracy that could only be exhibited by people welcoming of change. We appreciate the contribution of everyone who was involved in this mode of judicial education and training. We were fortunate enough to have our Hon'ble Judges as Resource Persons in the various training courses conducted by the Academy as well as Resource Persons from other fields throughout the year including the disarrayed period of the pandemic. We express our earnest gratitude to them.

Apart from these academic activities, the Academy has made achievements in the field of infrastructural development too. Regional Centre at Gwalior and the renovated Academic Block and Library "Gyan Sagar" were inaugurated during this year. Work of the new complex of State Judicial Academy has also been set in motion. We note and honour the efforts of all personnel who have helped us through this year.

'The end' is an interesting phrase, that means what you will make it mean. Where there is despair, let 2021 bring joy, where there is darkness, let there be light and where there is sorrow, let it bring hope. Because hope never dies; it stays with you even in the bleakest of times. If the slogan of 2020 was to stay safe, an appropriate slogan for 2021 should be to stay determined. Take heart; slowly but surely, the pandemic will fade away, so let's welcome 2021 warmly. We wish you a year of engagement in the great causes, shared with and bolstered by all of us.

I hope the New Year brings good health, happiness and good fortune.

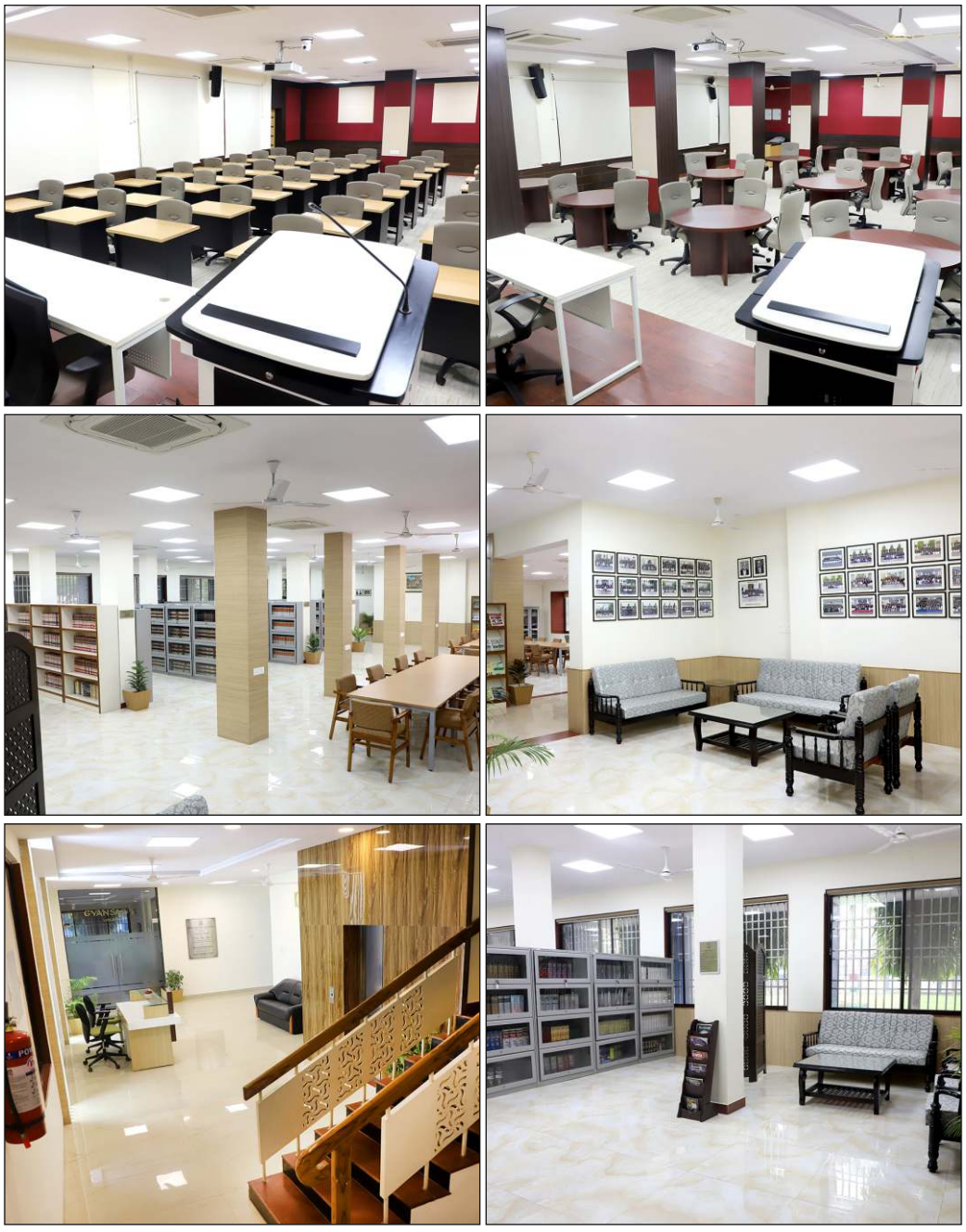
Ramkumar Choubey
Director

GLIMPSES OF INAUGURATION OF RENOVATED ACADEMIC BLOCK AND LIBRARY 'GYAN SAGAR' (26.11.2020)

Hon'ble the Acting Chief Justice and Companion Judges unveiling the plaque

Hon'ble Shri Justice Sanjay Yadav, Acting Chief Justice, High Court of Madhya Pradesh addressing the august gathering

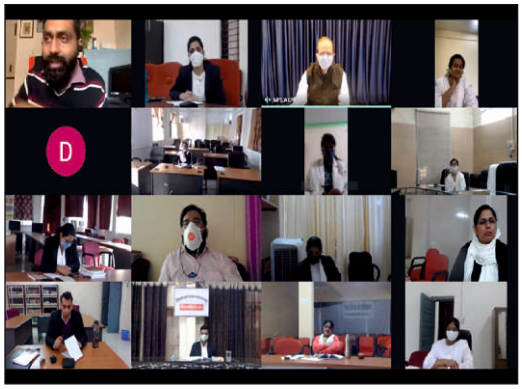
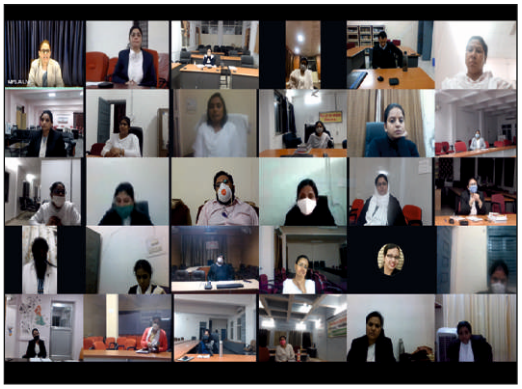
RENOVATED ACADEMIC BLOCK & LIBRARY GYAN SAGAR



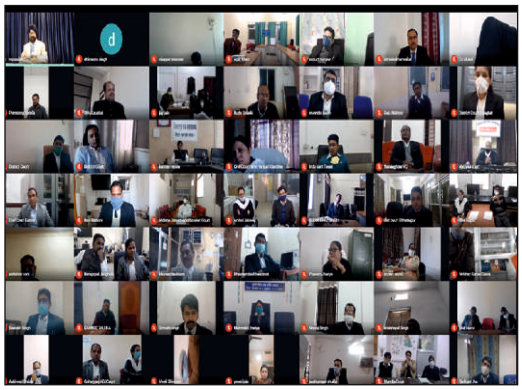
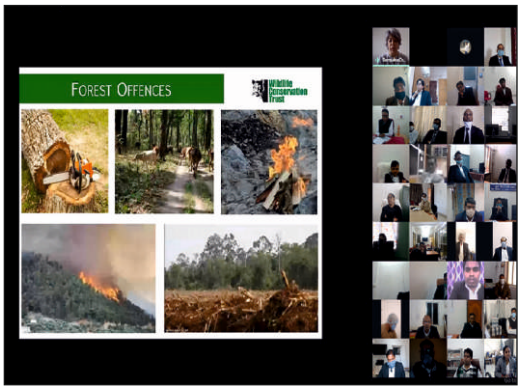
GLIMPSES OF SECOND PHASE INDUCTION COURSE (2020 BATCH) CONDUCTED ONLINE (02.11.2020 - 28.11.2020)

Participants at different District Headquarters

GLIMPSES OF EDUCATIONAL PROGRAMMES CONDUCTED ONLINE

Juvenile Justice (Care & Protection of Children) Act, 2015
(28.11.2020)

Forest Laws
(05.12.2020)


First Refresher Course (2018 Batch) (Group 1)
(07.12.2020 – 11.12.2020)

GLIMPSES OF EDUCATIONAL PROGRAMMES CONDUCTED ONLINE

First Refresher Course (2018 Batch) (Group 2)
(15.12.2020 – 18.12.2020)

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
(19.12.2020)

N.D.P.S. Act, 1985
(19.12.2020)

OBITUARY

HON'BLE MISS JUSTICE VANDANA KASREKAR

Hon'ble Miss Justice Vandana Kasrekar was born on 10th July, 1960 in the family of agriculturist in village Nanod, Tehsil & District Indore, Madhya Pradesh. After completing education, enrolled as an Advocate of M.P. State Bar Council and practiced under the able guidance of Hon'ble Shri Justice V.S. Kokje till July, 1990 and thereafter, under Hon'ble Shri Justice S.S. Samvatsar and Shri G.M. Chapekar. Practiced on Civil and Constitutional matters at High Court of Madhya Pradesh, Bench at Indore. Took oath as Additional Judge of the High Court of Madhya Pradesh on 25th October, 2014 and Permanent Judge on 27th February, 2016.

During Her Ladyship's tenure in the High Court of Madhya Pradesh, rendered valuable services as Judge and also as Member of the High Court Training Committee as well as other Committees of the High Court.

She left for her heavenly abode on 13th December, 2020, while in service.

•

PART - I

ADDRESS BY HON'BLE THE ACTING CHIEF JUSTICE*

At the outset, I extend my best wishes of *'Samvidhan Diwas'*.

On this day 71 years ago, WE, THE PEOPLE OF INDIA, SOLEMNLY RESOLVED to constitute India into a SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC with the commitment to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

I wish that this dynamic and ever-growing Constitution will continue to enlighten my countrymen to be righteous and to move on the right path with all diversities to attain a United One. So that, the dream of Unity in Diversity is attained. And country march on towards new heights.

As to our Judicial Academy, with a humble beginning in a single court room in the High Court in April 1994, we have travelled a long way to have a state of art building equipped with all modern amenities, an Institution could ever need.

Over the course of 26 years, we have been able to set milestone with significant overhaul in the judicial training. In these years, in addition to infrastructural progress, we have added a diverse set of training courses to facilitate rapidly growing judicial environment. Qualitative legal education and training is being attained with innovative courses.

While unveiling renovated Academic Block and Library 'Gyan Sagar', I was instantly reminded of Francis Bacon's essay "Of Studies", He writes,

> "Studies serve for delight, for ornament, and for ability. Their chief use for delight, is in privateness and retiring; for ornament, is in discourse; and for ability, is in the judgment, and disposition of business. For expert men can execute, and perhaps judge of particulars, one by one; but the general counsels, and the plots and marshalling of affairs, come best, from those that are learned."

He further writes that, "Crafty men contemn studies, simple men admire them, and wise men use them; for they teach not their own use; but that is a wisdom without them, and won by observation".

---

* Text of the Address of Hon'ble Shri Justice Sanjay Yadav, Acting Chief Justice, High Court of Madhya Pradesh and Patron MPSJA on the occasion of inauguration of renovated Academic Block and Library 'Gyan Sagar' on 26.11.2020 at MPSJA, Jabalpur

And, with the hope that wise men of the Academy will ensure that these Books are read “not to contradict and confute; nor to believe and take for granted; nor to find talk and discourse; but to weigh and consider”, i wish you all better future.

Thank You

Jai Hind

●

धर्मो विश्वस्य जगतः प्रतिष्ठा।
लोके धर्मिष्ठं प्रजा उपसर्पन्ति।
धर्मेण पापमपनुदति।
धर्मे सर्वं प्रतिष्ठितम्।
तस्माद्धर्मं परमं वदन्ति।

Dharma constitutes the foundation of all affairs in the World. People respect those who adhere to Dharma. Dharma insulates (man) against sinful thoughts. Everything in this world is founded on Dharma. Dharma therefore, is considered supreme. [Taittiriyopanishad – Jnanasandhana Nirupanam – vide Sasvara Vedamantra p. 128]

EXERCISE OF JURISDICTION DURING INVESTIGATION VIS-A-VIS ON FILING OF CHARGE SHEET

– By **Mamta Jain**
Special Judge [SC/ST (PA) Act]
Sidhi

This article deals with a situation where police has registered an FIR mentioning certain offences but on production of case diary during investigation before a Judicial Magistrate or upon final report submitted u/s 173 (2) of the Code of Criminal Procedure, 1973 (in short- CrPC), it appears to such Judicial Magistrate that some other offence has also been committed, whether he may direct the police to add such offence and investigate accordingly in case of pending investigation and may take cognizance and proceed further in case of final report.

Cognizance

The expression "cognizance" means a Court or a Magistrate takes judicial notice of an offence with a view to initiate proceedings in respect of such offence. In other words, it occurs as soon as the Court or Magistrate applies mind to the alleged commission of an offence. Taking of cognizance is thus a sine qua non or a condition precedent for holding a trial. Section 190(1) CrPC contains the provision for cognizance of offences by the Magistrates and it provides three ways by which such cognizance can be taken which are reproduced hereunder: (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report in writing of such facts, that is, facts constituting the offence-made by any police officer; (c) upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion that such offence has been committed". Hon'ble Supreme Court in ***State of Gujarat v. Girish Radhakrishnan Varde, AIR 2014 SC 620*** has made certain observations in this regard.

Complaint case

In case of complaint, a Judicial Magistrate can take cognizance u/s 190(1)(a) CrPC In such matters, it is open to the Magistrate to direct investigation u/s 156(3) CrPC A Magistrate has full authority to conduct an inquiry into the complaint and thereafter arrive at a conclusion that for which offences cognizance to be taken despite of sections of offences mentioned in the complaint. Legal position in this regard has been summarized in ***Tularam v. Kishore Singh, AIR 1977 SC 2410*** as follows:

> ''1. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:
>
> (a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

2. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint."

The statutory scheme contained in section 156(3) CrPC has been dealt with in detail in the case of ***Vinubhai Haribhai Malaviya and ors. v. State of Gujarat and anr., AIR 2019 SC 5233***.

Police case

Whenever a cognizable offence comes to the notice of an Officer-in-charge of a Police Station, it is obligatory to register FIR u/s 154 CrPC. However, if the offence complained of is a non-cognizable one, then in compliance with section 155 (1) CrPC, the police officer mentioned this fact in diary and refers the informant to the concerned Judicial Magistrate. Hon'ble the Supreme Court in ***Lalita Kumari's case*** reported in ***(2014) 2 SCC 1*** has laid down the legal prepositions in this regard. After registration of the FIR, the investigation is conducted by police authorities in terms of procedure prescribed under Chapter XII of CrPC The proceedings initiated from registration of FIR comes to an end with the filing of final report or charge sheet u/s 173 (2) CrPC A Magistrate can take cognizance u/s 190 (1)(b) CrPC upon a police report.

Jurisdictional aspect

The role of the Magistrate may also begin during the course of an investigation when accused is being produced for remand, applications for bail or for interim custody of property are filed etc. The Magistrate may, subject to the provisions of section 167 CrPC authorized in detention irrespective of jurisdiction to try the case, and if he has no jurisdiction to try the case or commit it for trial and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. For example; if any case is registered under NDPS Act, the Magistrate is not empowered to authorise the detention for more than first 15 days. In such matters, the Magistrate has jurisdiction to direct the police to get further remand from the Special Court concerned.

In the case of ***Abhinandan Jha and ors. v. Dinesh Mishra, AIR 1968 SC 117***, Hon'ble Supreme Court held that the entire scheme of Chapter XIV clearly indicates that the formation of the opinion, as to whether or not there is a case to place the accused for trial, is that of the Officer-in-charge of the police station and no doubt, it is open to the Magistrate to accept or disagree with the opinion

of the police but he cannot compel the police to form a particular opinion, on the investigation, and to submit a report, according to such opinion. In the case of ***S.N. Sharma v. Bipen Kumar Tiwari, AIR 1970 SC 786*** it has been observed that a Magistrate cannot control the power of police to investigate into cognizable offences. However, such powers of investigation are not uncontrolled and, the police do not have unfettered and unlimited discretion in that regard. Where non-interference would result in miscarriage of justice, interference by the Court is permissible u/s 156 (3) CrPC which provides for a check by the Magistrate on the police performing its duty under Chapter XII CrPC. In the case of ***Union of India v. Prakash P. Hinduja and anr., (2003) 6 SCC 195***, it has been held that in cases where the Magistrate on an application u/s 156(3) CrPC is satisfied that proper investigation has not been done by the officer-in-charge of the concerned police station, he can certainly direct the officer-in-charge of the police station to make a proper investigation and can further monitor the same, though he should not himself investigate.

In the case of ***Sakiri Vasu v. State of U.P. and Ors., AIR 2008 SC 907*** it has been held that if an application u/s 156(3) CrPC is filed before the Magistrate, the Magistrate can direct the FIR to be registered and can also direct a proper investigation to be made in a case, and according to the aggrieved person where no proper investigation was made. The Magistrate can also monitor the investigation to ensure a proper investigation. Hon'ble Supreme Court has taken the same view in a recent case of ***M. Subramaniam v. S. Janaki, 2020 SCC OnLine SC 341***.

The question "whether after a charge sheet is filed by the police the Magistrate has power to order further investigation, and if so, up to what stage of a criminal proceeding" was discussed by Hon'ble the Apex Court in the case of ***Vinubhai*** (supra). After referring to a number of Judgment on the point, three Judges Bench of Hon'ble the Supreme Court overruled the law laid down in the cases of ***Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel and Ors., AIR 2017 SC 774, Athul Rao v. State of Karnataka and Anr., AIR 2017 SC 4021 and Bikash Ranjan Rout v. State through the Secretary (Home), Government of NCT of Delhi, AIR 2019 SC 2002***, wherein it was held that further investigation cannot be ordered by Magistrate at post cognizance stage. In ***Vinubhai*** (supra), it has been held that the Magistrate's power u/s 156(3) CrPC is very wide and Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which indubitably would include the ordering of further investigation after a report is received by him u/s 173(2) CrPC and which power would continue to exist in such Magistrate at all stages of the criminal proceedings until the trial itself commences.

Therefore, it is clear that a Magistrate has power u/s 156 (3) CrPC to ensure a proper investigation but his jurisdiction to interfere in investigation is limited. If the Magistrate finds that non-interference will cause miscarriage of justice, he may interfere in the investigation to that extent under the powers given in section 156 (3) CrPC.

The question, if the Magistrate, at the stage of taking cognizance, is of the view that the investigating authorities have failed in their duty by not including the appropriate sections of the IPC or of any other Special Act, which is/are *prima facie* made out or indicated from the facts of the FIR or the charge-sheet, then whether the police can be directed or ordered by the Magistrate to fill this lacuna or the Magistrate can refuse to take cognizance on the charge-sheet and return the same for presentation to the Special Court or any other Court straightaway even though the offence/s shown in the charge-sheet is/are triable by the Court of Judicial Magistrate?

In ***Minu Kumari v. State of Bihar, (2006) 4 SCC 359***, Supreme Court explained the powers that are vested in a Magistrate upon filing of final report in terms of S.173 (2)(i) CrPC and the kind of orders that the Magistrate/Court can pass. Supreme Court held that when a report is filed before a Magistrate, he may either accept the report and take cognizance of the offences and issue process; or may disagree with the report and drop the proceeding; or may direct further investigation and require the police to make a further report. A Magistrate does not have any power to return the charge-sheet for filing the same in any other Court.

Some special statutes provide for the establishment of Special Courts for the trial of offences under those statutes. Some of those special statutes lay down special procedure relating to the investigation, cognizance, trial etc. Subject to the enabling provisions of any such special statutes, Special Courts may take cognizance of the offence without the accused being committed to it for trial. For example; POCSO Act, NDPS Act, SC/ST (PA) Act etc. However, there is no provision in these Acts that such Special Courts alone can take cognizance of an offence punishable under the said Acts. Since, such Special Courts are deemed to be a Court of Sessions, the provisions of the Code are applicable to it. As per provisions of the Code, the Court of Magistrate is competent to take cognizance of any offence even though the offence may be triable by a Court of Sessions. The Magistrate after taking cognizance of the offences can always commit the case for trial to the Sessions Court or the Special Court, if it appears to the Magistrate on the basis of the facts of FIR or case diary that an offence triable by the Sessions Court or the Special Court is made out in addition to or in place of the offence(s) registered by the police. There is no legal prohibition in law in this regard.

If the police has filed the charge-sheet only under the offence/s triable by the Magistrate and the Magistrate finds that offence triable by a Special Court is also made out for which he does not have the jurisdiction to try, then after taking cognizance and compliance of section 207 CrPC he may commit the case to the Special Court by taking aid of the provisions of section 209 CrPC. Apart from that, if the Magistrate at the stage of framing charges, after hearing both the parties and considering all the documents of the prosecution, finds that the offence is triable by Sessions Court or any Special Court, even then he is free

to commit the case to the Session Court or Special Court. At that stage simultaneously, the accused also has the liberty to put his submission for not making out any offence triable by Sessions Court or Special Court depending upon the material collected during investigation. Under sections 209 and 323 CrPC a Magistrate is empowered to commit the case to a Court of Sessions. Same position applies for offences triable by Special Courts where the Magistrate finds that the police authorities have erred to add any additional offence triable by any Special Court or omitted to add any offence triable by any Special Court. The Magistrate cannot straightaway direct the laying of charge-sheet before the Special Court on the pretext that the offence is triable by the Special Court and thereby refuse to take the charge-sheet. In the case of ***A. Subhaschandra Bose v. State of A.P. and anr, 1973 CrLJ 503***, it has been held that a Magistrate cannot return a charge sheet once it is filed in the Court.

The issue has also been dealt in the case of ***Ashish Kumar v. State of UP and another, 2015 Cr.L.J. 3552***, wherein the order of the Magistrate for returning the charge-sheet for filing the same before the Special Court of POCSO cases was held to be improper.

Conclusion

From the above discourse, it can be concluded that in a case is based on the FIR u/s 154 CrPC, it is the investigating agency of the police which alone has the statutory right to carry on investigation in terms of procedure prescribed under Chapter XII of the CrPC and the Magistrate cannot control the power of the police to investigate into a cognizable offences. However, after submission of the charge-sheet, the Magistrate while forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial, does not have any power to return the charge-sheet only on the ground that the police has erred in not including the offence(s) which is/are triable by the Special Court, in the charge-sheet. If the police has not registered the case under any offence which is exclusively triable by the Sessions Court or by the Special Court, then the Magistrate is empowered to commit the case to the Sessions Court or to the Special Court, as the case may be, by taking aid of the provisions of section 209 CrPC but it is permissible only after taking cognizance.

Similarly, where the Magistrate is of the same view at the stage of framing of charges or at any further stage, he can then as well commit the case to the Sessions Court or to the Special Court by taking aid of the provisions of section 323 CrPC.

●

BAR OF SUBSEQUENT SUIT UNDER ORDER 2 RULE 2 CPC

– By **Tajinder Singh Ajmani**
O.S.D., MPSJA

Object

Order 2 Rule 2 CPC is based on the cardinal principle that defendant should not be vexed twice for the same cause. It requires the unity of all claims based on the same cause of action in one suit. It does not contemplate unity of distinct and separate cause of action; this rule consists of three different situations; (i) Rule 2(1) is premised on the foundation that the whole of the claim which a plaintiff is entitled to make in respect of a cause of action must be included (however, it is open to the plaintiff to relinquish any portion of the claim); (ii) The mandate of Rule 2(2) is that a plaintiff who omits to sue in respect of or intentionally relinquishes any portion of the claim, shall not afterwards be entitled to sue in respect of the portion omitted or relinquished (but it is equally necessary to note that Rule 2(2) does not postulate the grant of leave); (iii) Rule 2(3) stipulates that a person who is entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs. The leave of the Court will obviate the consequence which arises under Rule 2(3). In the absence of leave being sought and granted, a plaintiff would be barred from subsequently suing for the relief which has been omitted in the first instance.

Essential elements

In order that a plea of a bar under Order 2 Rule 2(3) CPC should succeed, the defendant who raises the plea must make out –

(a) that the second suit is in respect of the same cause of action as that on which the previous suit is based;

(b) that in respect of that cause of action the plaintiff was entitled to more than one relief in previous suit.

(c) that being thus entitled to more than one relief, the plaintiff without leave obtained from the Court omitted to sue for the relief for which the second suit has been filed.

Test to be applied

Order 2 Rule 2 CPC has been dealt with in several judgments. Privy Council in ***Mohd. Khaleel Khan v. Mahbub Ali Mia, AIR 1949 PC 78*** pointed out what shall be the correct test for applying this principle. Recently a three judge bench of Supreme Court in ***Varimi Pullarao S/o Satyanarayana v. Vermari Vyankata Radharani w/o Dhankoteshwar Rao and anr., AIR 2020 SC 395*** referred these tests again; given as follows:

(i) The correct test in cases falling under Order 2 Rule 2 is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

(ii) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(iii) If the evidence to support the two claims is different, then the causes of action are also different.

(iv) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(v) The cause of action has no relation whatever to the defence that may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour.

How it to be proved

Hon'ble Supreme Court in ***Gurbax Singh v. Bhooralal, AIR 1964 SC 1810***, (Constitution Bench) while considering the issue of Order 2 Rule 2 CPC held that:

> "… As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. Without the plaint in the previous suit being on the record, a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code was not maintainable."
>
> "... We consider that a plea under Order 2 Rule 2 of the Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits the defence which raises the bar has necessarily to establish the cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court, the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed."

Again in the case of ***Alka Gupta v. Narendra Kumar Gupta, AIR 2011 SC 9*** the Supreme Court relying on the ratio laid down by the Constitution Bench in ***Gurbax Singh*** (supra) has held that unless the defendant pleads the bar under Order 2 Rule 2 and an issue is framed focusing the parties on that bar to the suit, obviously the court cannot examine or reject a suit on that ground. The pleadings in the

earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. Further, while considering whether a second suit by a party is barred by Order 2 Rule 2, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action.

When suit is barred: few illustrations

- Where the cause of action in the first suit was the desire of the plaintiff to separate from his brothers and to divide the joint family property that suit embraced the entire property without any reservation and was compromised, the plaintiff having abandoned his claim to account in respect of other business. Subsequent suit was filed to enforce a part of the claim which was abandoned in the first suit. In this situation, a Three Judge Bench of the Supreme Court in ***Shankar Sitaram Sontakke and anr. v. Balkrishna Sitaram Sontakke and ors., AIR 1954 SC 352*** held that on the same cause of action which plaintiff deliberately relinquished, the suit was barred under Order 2, Rule 2(3) CPC.
- In ***Van Vibhag Karmchari Griha Nirman Sahakari Sanstha Maryadit (Regd.) v. Ramesh Chander and ors., 2010 AIR SCW 6761*** where appellant a Co-operative Housing Society entered into agreement to sell with respondent vendor and no date was fixed for performance in the agreement for sale entered between the parties and when by notice respondent had made his intentions clear about refusing the performance of the agreement and cancelled the agreement, the limitation of three years for seeking relief of specific performance would start running from that date and as appellant filed suit for declaration of title and injunction and omitted to include relief of specific performance, the Apex Court held that

  "It would amount to relinquishment of claim of specific performance the suit filed by appellant, therefore, would be hit by the provisions of Order 2 Rule 2 CPC"
- In ***M/s Virgo Industries (Eng.) Private Limited v. M/s Venturetech Solutions Private Limited, (2013) 1 SCC 625*** facts of the case that two sale agreements were executed by the defendant in favour of the plaintiff in respect of two plots. In the suit filed by the plaintiff for injunction, it was pleaded that the defendant is attempting to frustrate the agreement and transferring the suit property to third parties. Applying the principle of Order 2 Rule 2, the Supreme Court held that prior to filing of first set of suits, plaintiff was well aware of intention of defendant that he would not honour said agreement to sell and that fact was also brought out in first set of suits. Therefore, cause of action for filing first suit's relief of permanent injunction also furnished, cause of action for relief of specific performance, as cause of action for both the set of suits, subsequent set of suits were not maintainable. It has also been held that Order 2 Rule 2 will not only apply where first suit is disposed of but also where second suit is filed during the pendency of first suit, if the cause of action in the later suit is the same as in the former suit.

- Where first suit for recovery of amount was filed against bank and its officers towards letter of credit while subsequent suit claiming damages was filed against bank for withdrawing credit facility on these facts in ***State Bank of India v. Gracure Pharmaceuticals Ltd., AIR 2014 SC 731*** it has been held that no fresh cause of action arose in between the first suit and the second suit. Therefore, subsequent suit is barred by Order 2, Rule 2.
- In ***M/s. Raptakos, Brett and Co. Ltd. v. M/s. Ganesh Property, AIR 2017 SC 4574*** earlier suit for ejection of lessee from suit property and mesne profits, attaining finality with direction to lessee to vacate premises with payment of occupation charges as fixed. Subsequent suit claiming mesne profits for very same period during which fixed amount paid by lessee and accepted by lessor without objection, it has been held that suit is not maintainable.

When suit is not barred: few illustrations

- In ***Sidramappa v. Rajashetty, AIR 1970 SC 1059***, it has been observed by the Supreme Court that if the cause of action on the basis of which the previous suit was brought, does not form the foundation of the subsequent suit and in the earlier suit, the plaintiff could not have claimed the relief which he sought in the subsequent suit, the latter namely, the subsequent suit, will not be barred by the rule contained in Order 2, Rule 2, CPC.
- A Three Judge Bench of the Supreme Court in ***Arjun Lal Gupta and anr. v. Mriganka Mohan Sur and ors., AIR 1975 SC 207*** held that failure of the defendants to carry out terms of compromise decree constituting a part of cause of action in subsequent suit, the bar of O. 2 R. 2 is not attracted.
- Former suit filed by plaintiff for declaration that he was lessee and for injunction restraining defendants from interfering with his possession of suit property. Dismissal of the suit on technical ground that plaintiff was no more in possession of suit property and a suit for mere declaration cannot lie. On the basis of given facts Supreme Court in ***Inaclo Martines (Deceased) through LRs. v. Narayan Hari Naik and ors., AIR 1993 SC 1756*** held that since question of status of plaintiff as lessee was not decided in earlier suit, subsequent suit not barred by O.2 R. 2(3).
- Suit for eviction on the ground of *bona fide* need and sub-letting in which arrears of rent not claimed, finding given by Court on issue of arrears which was not an issue before Court, in that situation the Apex Court in ***Rikabdas A. Oswal v. M/s. Deepak Jewellers and ors., 1999 AIR SCW 4731*** laid down that subsequent suit for eviction cannot be barred by O. 2 R. 2(3).
- In ***Deva Ram and anr. v. Ishwar Chand and anr., 1995 AIR SCW 4210*** facts of the case that previous suit was filed for recovery of a sum, as sale-price of the land which was dismissed with the finding that the document on which the suit was filed was not a sale deed but was a mere agreement for sale and, therefore, the amount in question could not be recovered as sale-price. The subsequent suit was brought by the plaintiffs for recovery of possession on the ground that they were the owners of the land in suit and

were consequently entitled to recover its possession. It has been held that the cause of action in the subsequent suit was, therefore, entirely different.

- Where first suit filed to enforce bank guarantee, then after second suit filed to claim damages for breach of contract relating to which bank guarantee was given. It has been observed by the Supreme Court in ***State of Maharashtra and anr. v. M/s National Construction Company, Bombay and anr., AIR 1996 SC 2367*** that relief sought in first suit based on different cause of action from that upon which relief in subsequent suit was founded therefore, subsequent suit not hit by O. 2 R. 2.
- In ***Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co., AIR 1997 SC 1398*** where the first suit was based on infringement of plaintiff's trade mark, second suit was on the continuing act or infringement of its trade mark and continuous passing of action subsequent to filing of the earlier suit, it was held that in the case of continuing or recurring wrong there would be corresponding continuing or recurring causes of action which were different in two suits. As such the bar of Order 2 Rule 2 is not attracted.
- In ***Alka Gupta*** (supra) the cause of action for the first suit was non-payment of price under the agreement of sale dated 29.06.2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved ownership constituted under deed dated 05.04.2000. It was held that merely because the agreement of sale related to an immovable property at Rohini and the business run therein under the name of 'Takshila Institute' and the second suit referred to a partnership in regard to business run at Pachhim Vihar, New Delhi, also under the same name of Takshila Institute, it cannot be assumed that the two suits relate to the same cause of action.
- In ***Dr. Amit Kumar v. Dr. Sonila and ors., AIR 2018 SC 5312*** at the time of divorce by mutual consent of parties where custody of minor children laid with husband. It has been held by the Apex Court that merely because of performing of second marriage, husband cannot be deprived of his legal right of custody. Wife relinquishing her rights to claim custody at the time of decree of divorce, cannot subsequently claim for custody after divorce.
- In ***Shivnarayan (D) by L.Rs. v. Maniklal (D) Thr. L.Rs. and ors., AIR 2019 SC (Supp) 996*** it has been pointed out that sub-clause (1) of Order 2, Rule 3 provides that plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly, if there are different set of defendants who have different causes of actions, principle does not apply.

Difference between Order 2 Rule 2 and Res judicata

In ***Alka Gupta*** (supra) distinction between res judicata under section 11 and Order 2 Rule CPC has been pointed out in the following manner:

> "*Res judicata* means a thing adjudicated' that is an issue that is finally settled by judicial decision. Constructive *res judicata* deals with grounds of attack and defence which

ought to have been raised, but not raised, whereas Order 2, Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed. But the High Court (both the trial bench and appellate bench) have erroneously assumed that a plea of *res judicata* would include a plea of bar under Order 2, Rule 2 CPC. *Res judicata* relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2, Rule 2 CPC requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different, and one will not include the other."

Conclusion

Based on the aforementioned discussion, statutory scheme under Order 2 Rule 2 CPC may be summarised as under:

(1) The correct test in cases falling under Order 2 Rule 2 is whether the claim in the new suit is in fact found upon a cause of action distinct from that which was the foundation for the former suit. If the evidence to support the two claims is different, then the causes of action are also different.

(2) In order to attract the applicability of the bar enunciated under Order 2 Rule 2, the cause of action on which the subsequent claim is found ought to have arisen to the plaintiff when enforcement of the first claim was sought before the Court.

(3) As the plea is a technical bar, it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning without the plaint in the previous suit being on the record, a plea of a bar under O. 2 R. 2 is not maintainable.

(4) Unless the defendant pleads the bar under Order 2 Rule 2 and an issue is framed focusing the parties on that bar to the suit, obviously the court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action.

(5) Order 2 Rule 2 will not only apply where first suit is disposed of but also where second suit is filed during the pendency of first suit, if the cause of action in the later suit is the same as in the former suit.

(6) Further, while considering whether a second suit is barred by Order 2, Rule 2, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action.

(7) The rule requires the unity of all claims based on the same cause of action in one suit. It does not contemplate unity of distinct and separate causes of action. If, therefore, the subsequent suit is based on a different cause of action, the rule will not operate as a bar.

●

अपराधों का शमन : कतिपय मार्गदर्शी विधिक सिद्धान्त

भरत कुमार व्यास
अपर जिला न्यायाधीश, भोपाल

दण्ड प्रक्रिया संहिता, 1973 (संक्षेप में – ''संहिता'') की धारा 320 में अपराधों के शमन का प्रावधान किया गया है। धारा 320 की उपधारा (1) में न्यायालय की अनुमति के बिना और उपधारा (2) में न्यायालय की पूर्व अनुमति से शमन किये जा सकने वाले, भारतीय दण्ड संहिता के अंर्तगत दण्डनीय अपराधों की सूची शमन के लिए सक्षम व्यक्ति के उल्लेख के साथ सारणी में दी गई है। शमनीय अपराधों के दुष्प्रेरण एवं प्रयत्न के अपराध उपधारा (3) में शमनीय बनाए गए हैं साथ ही भारतीय दण्ड संहिता की धारा 34 व 149 के अंर्तगत क्रमशः सामान्य आशय व सामान्य उद्देश्य के अग्रसरण में किये गए अपराधों को शमन योग्य बनाया गया है। उपधारा (4) में अवयस्क और विकृतचित्त की ओर से तथा मृतक की दशा में विधिक प्रतिनिधि द्वारा अपराध शमन करने विषयक उपबंध किए गए हैं। उपधारा (5) व (6) में मामला विचारार्थ सुपुर्द किये गये न्यायालय, अपील न्यायालय और पुनरीक्षण शक्तियों के प्रयोग में उच्च न्यायालय और सेशन न्यायालय के समक्ष अपराध शमन किए जा सकने के प्रावधान हैं। उपधारा (7) में पूर्व दोषसिद्धी के कारण वर्धित दण्ड से या भिन्न किस्म के दण्ड से दण्डनीय अपराध को शमन के अयोग्य बनाया गया है। उपधारा (8) के अनुसार शमन का प्रभाव दोषमुक्ति होगा। जबकि उपधारा (9) में स्पष्ट किया गया है कि उपधारा (1) व (2) की सारणी में वर्णित अपराधों के अलावा अन्य कोई अपराध, जब तक कि किसी विधि में शमनीय नहीं बनाया गया हो, शमन योग्य नहीं होगा।

सक्षम व्यक्ति की ओर से ही शमन हेतु आवेदनः

उपधारा (4) में अवयस्क और विकृतचित्त की ओर से तथा मृतक की दशा में विधिक प्रतिनिधि द्वारा अपराध शमन करने के उपबंध किए गए हैं। अतः जो आवेदन प्रस्तुत कर रहा है उसे संविदा करने में सक्षम होना आवश्यक है। जहां शमन हेतु सक्षम व्यक्ति की मृत्यु हो गई है तब उसका विधिक प्रतिनिधि अपराध शमन कर सकता है। विधिक प्रतिनिधि की परिभाषा सिविल प्रक्रिया संहिता, 1908 की धारा 2(11) दी गई है। इसके तहत वह व्यक्ति जो मृतक की संपदा में दखलंदाजी करता है और उसके स्थान पर वाद ला सकता है और जिसमें संपदा पक्षकार के मरने के बाद न्यागमित हुई है वह व्यक्ति आता है।

आवेदन पूर्ण व सत्यापित एवं स्वेच्छया प्रस्तुत किया जानाः

न्यायालय का दायित्व है कि वह यह देखे कि जो व्यक्ति अपराध शमन कर रहा है वह बिना किसी डर, दबाव या लालच के अपराध शमन कर रहा है अथवा नहीं। इस संबंध में ***सागर नामदेव वि. म.प्र. राज्य व अन्य, 2017 सी.आर.एल.जे. 781*** में पक्षकारों के मध्य राजीनामा होने पर भी अभियुक्त द्वारा आहत पर दबाव बनाने संबंधी तथ्य न्यायालय समक्ष आने पर ऐसे दबाव के अधीन किये गये समझौते को अमान्य करने संबंधी विधि प्रतिपादित की गई है। आवेदन पूर्ण और उचित रूप से

सत्यापित होना चाहिये। माननीय मध्यप्रदेश उच्च न्यायालय ने ***अनूप जैन व अन्य वि. म.प्र. राज्य, 2018 लॉ सूट एम.पी. 1381*** में प्रतिपादित किया है कि शमन हेतु अपूर्ण व असत्यापित आवेदन विधि की दृष्टि में वैध नहीं हैं।

क्या अभियुक्त पूर्व दोषसिद्ध है:

संहिता धारा 320 की उपधारा (7) में पूर्व दोषसिद्धी के कारण वर्धित दण्ड से या भिन्न किस्म के दण्ड से दण्डनीय अपराध को शमन के अयोग्य बनाया गया है। अतः शमन संबंधी आवेदन पर विचार के समय न्यायालय को यह भी देखना चाहिये कि क्या अभियुक्त के विरूद्ध पूर्व दोषसिद्धी का आरोप है।

अपराध की प्रकृति:

शमन किए जाने वाले अपराध की प्रकृति को विचार में लिया जाना आवश्यक है। ***गोपाल तिवारी वि. म.प्र. राज्य, 1999 क्रिमिनल लॉ जनरल 3417 म.प्र.*** में प्रतिपादित किया है कि शमन संबंधी आवेदन को स्वीकार करते समय न्यायालय को न सिर्फ उभयपक्ष के मध्य राजीनामा अपितु समाज पर पड़ने वाले प्रभाव को भी विचार में लेना चाहिये।

अपराध की तिथि विचार में लेना:

जहां अपराध कारित किए जाने के समय शमनीय नहीं था किन्तु विधि में पश्चात्वर्ती संशोधन से ऐसा अपराध अशमनीय बना दिया गया है तब यह प्रश्न होगा कि क्या अपराध का शमन किया जा सकता है? उदाहरण के लिए भारतीय दण्ड संहिता की धारा 324 के अंतर्गत अपराध जिसे दण्ड प्रक्रिया संहिता संशोधन अधिनियम, 2005 जो दिनांक 31.12.2009 से प्रभावशील है, द्वारा अशमनीय बनाया गया है। इस संबंध में ***सूरज धानक वि. म.प्र. राज्य, 2017(1) एमपीएलजे 139*** एवं ***शंकर यादव अन्य विरूद्ध छत्तीसगढ़ राज्य, 2017 (4) टाईम्स 356 सुप्रीम कोर्ट*** अवलोकनीय है जहां प्रतिपादित किया गया है कि अपराध शमन संबंधी आवेदन पर विचार करते समय अपराध की दिनांक महत्वपूर्ण है। यदि अपराध की दिनांक को अपराध शमनीय था तो पश्चात्वर्ती संशोधन से ऐसा अपराध अशमनीय बना दिए जाने के आधार पर शमन हेतु आवेदन अस्वीकार किया जाना उचित नहीं है, अपराध शमन योग्य होगा।

अशमनीय अपराध का शमन नहीं किया जाना:

कभी–कभी अशमनीय प्रकृति के अपराधों के संबंध में यह तर्क दिया जाता है कि माननीय सर्वोच्च न्यायालय और उच्च न्यायालय ने अशमनीय अपराधों में भी अपराध शमन की अनुमति दी है। संहिता की धारा 320 की उपधारा (9) में स्पष्ट किया गया है कि उपधारा (1) व (2) की सारणी में वर्णित अपराधों के अलावा अन्य कोई अपराध, जब तक कि किसी विधि में शमनीय नहीं बनाया गया हो, शमन योग्य नहीं होगा। माननीय सर्वोच्च न्यायालय ने ***विषवावहन दास वि. गोपेंनचंद हजारिका, एआईआर 1967 एससी 895*** में प्रतिपादित किया है कि यदि विधि में किसी अपराध के शमन के प्रावधान हैं तब ही अपराध का शमन किया जा सकता है अन्यथा नहीं।

यह ध्यान देने योग्य है कि ऐसे मामलों में वस्तुतः संहिता की धारा 482 के अंर्तगत उच्च न्यायालय एवं संविधान के अनुच्छेद 142 के अंतर्गत सर्वोच्च न्यायालय अशमनीय प्रकृति के मामलों में शमन की अनुमति देते हैं। ये शक्तियां विचारण न्यायालय के पास नहीं होती है। उल्लेखनीय है कि न्यायदृष्टांतों ***वॉय सुरेश बाबू वि. आन्द्रप्रदेश राज्य व अन्य, 1987(2) जेटी 361*** एवं ***महेशचंद्र व अन्य वि. राजस्थान राज्य, 1990 एससीसी सप्लीमेंट 681*** में प्रतिपादित सिद्धांत को संहिता की धारा 320 की उपधारा (9) के प्रकाश में ***रामलाल वि. जम्मु कश्मीर राज्य, 1999 (1) एससीसी 216*** में उचित विधि नहीं पाया है। ***बंकत वि. महाराष्ट्र राज्य, 2005(1) एमपीडब्ल्युएन 80 (सुप्रीम कोर्ट)*** में भी उक्त न्यायदृष्टांतों में प्रतिपादित विधि को उचित विधि नहीं माना है।

ज्ञानसिंह वि. पंजाब राज्य, एआईआर 2012 एससी सप्लीमेंट 838 में आपराधिक विचारण को समाप्त करने की शक्तियों और अपराध शमन की शक्तियों में अन्तर बताया गया है। ***म.प्र. राज्य वि. दीपक व अन्य, 2014 क्रिमिनल लॉ जनरल 4509 एससी*** में ***नरिंदरसिंह व अन्य वि. पंजाब राज्य व अन्य, (2014) 6 एससीसी 466*** का अनुसरण करते हुए प्रतिपादित किया है कि समाज के विरूद्ध अपराध होने पर पक्षकारों के समझौते के आधार पर उसे समाप्त नहीं करना चाहिये।

भारतीय दण्ड संहिता से भिन्न विधि में अपराधों का शमनः

संहिता की धारा 320 की उपधारा (9) में स्पष्ट किया गया है कि उपधारा (1) व (2) की सारणी में वर्णित अपराधों के अलावा अन्य कोई अपराध, जब तक कि किसी विधि में शमनीय नहीं बनाया गया हो, शमन योग्य नहीं होगा। न्यायदृष्टांत ***रमेशचंद्र वि. ए.पी. झवेरी, ए.आई.आर 1973 एस.सी. 84*** में प्रतिपादित किया गया है कि अन्य विधि में दण्डित अपराध जो कि संहिता के प्रावधानों के अंतर्गत विचारणीय हैं, यदि उपधारा (1) व (2) की सारणी में वर्णित नहीं हैं तो वे शमनीय नहीं माने जा सकते हैं। इसी संबंध में माननीय मध्यप्रदेश उच्च न्यायालय का न्यायदृष्टांत ***आशीष उर्फ बिट्टू शर्मा वि. म.प्र. राज्य व अन्य, 2016 (1) एमपीजेआर 122*** भी अवलोकनीय है। धारा 138 परक्राम्य लिखत अधिनियम की धारा 138 के अधीन अपराध उक्त अधिनियम की धारा 142 के अनुसार शमनीय है न कि संहिता की धारा 320 के अंतर्गत। अन्य विधि के अधीन अपराध में उस विधि विशेष में ही शमनीय होने पर शमन योग्य होंगे।

अशमनीय अपराध में समझौते का तथ्य दण्ड निर्धारण में विचार में लेनाः

न्यायदृष्टांत ***हंसी मोहन बर्मन व अन्य वि. असम राज्य व अन्य, (2008)1 एससीसी 184*** में प्रतिपादित किया है कि केवल वे अपराध जो धारा 320 की उपधारा (1) व (2) की सारणी में दर्शित किये हैं शमन योग्य हैं। अन्य अपराधों में, जो शमनीय नहीं हैं, केवल शमन के तथ्य को विचार में लेकर दोषसिद्धी होने पर दण्ड को कम किया जा सकता है। इस संबंध में ***शाजी उर्फ पप्पू वि. राधिका व अन्य, (2011)10 एससीसी 705*** एवं ***शंकर व अन्य विरूद्ध महाराष्ट्र राज्य, 2019 (5) एस.सी.सी. 166*** अवलोकनीय है। यद्धपि नवीनतम ***न्यायदृष्टांत म.प्र. राज्य वि. मदनलाल, एआईआर 2015 एससी 3003*** भी अवलोकनीय है जहां पर बलात्संग के मामले में राजीनामा या समझौता या मध्यस्थता

हो जाने के आधार पर दण्ड के प्रश्न पर नरम रूख अपनाना उचित नहीं ठहराया है। अर्थात् अपराध की प्रकृति और गंभीरता एवं दण्ड अधिरोपित करने के अन्य मार्गदर्शी सिद्धांत भी ध्यान में रखना चाहिए।

शमनीय और अशमनीय अपराधों के आरोपों की दशा में प्रक्रियाः

जहां कुछ धाराएं शमन योग्य अपराध की हैं और कुछ धाराएं अशमनीय अपराध की हों, तब ऐसे मामलों में न्यायालय शमन योग्य अपराधों के संबंध में शमन की अनुमति प्रदान कर सकता है और शमन के आधार पर अभियुक्त को दोषमुक्त कर सकता है जबकि अशमनीय अपराध के लिये विचारण पूर्ण कर गुण–दोष पर निर्णय दिया जाएगा। एक से अधिक अभियुक्तों की दशा में एक या अधिक अभियुक्त के विरूद्ध अपराध शमन करने व शेष के विरूद्ध विचारण पूर्ण कर गुण–दोष पर निर्णय करने के लिए भी न्यायालय समर्थ है। इस संबंध में ***फिलीपोज फिल्प वि. थॉमस जार्ज, 1952 क्रिमिनल लॉ जनरल 65*** एवं ***पी.एम. अबु बाकर वि. पी.जे. एलेक्जेंडर, 2000 क्रिमिनल लॉ जनरल 1168*** अवलोकनीय है।

अपराध के शमन का प्रभावः

अपराध शमन का प्रभाव अभियुक्त की दोषमुक्ति होता है। उन्हीं तथ्यों पर उसी अपराध के लिए अभियुक्त का पुनः विचारण संहिता की धारा 300 से बाधित होगा। इस सम्बन्ध में ***सुरवि मुखर्जी वि. राज्य, एआईआर 1965 कलकत्ता 469*** अवलोकनीय है।

दोषसिद्धी अभिलिखत करने और दण्डादेश पारित करने के बीच अपराध शमन हेतु आवेदन का निराकरणः

विचारण के दौरान किसी भी प्रक्रम पर शमन हेतु आवेदन पर विचार किया जा सकता है। न्यायदृष्टांत ***अजगर अली नजगर अली सिंगापुर वाला वि. बाम्बे राज्य, एआईआर 1957 एससी 503*** में प्रतिपादित विधि से स्पष्ट है कि किसी मामले में दण्ड सुनाये जाने तक विचारण प्रारंभ रहता है। ***असलम मीणा वि. एम्परर, एआईआर 1918 कलकत्ता 238(2)*** अवलोकनीय है जहां प्रतिपादित किया है कि दण्ड सुनाने से पूर्व प्रस्तुत हुए शमन आवेदन को न्यायालय विचार में ले सकती है।

इस संबंध में माननीय मध्यप्रदेश उच्च न्यायालय का न्यायदृष्टांत ***ओ.टी.जी. ग्लोबल फाईसेंस लिमिटेड कम्पनी व अन्य वि. मोहन मंडेलिया व अन्य आईएलआर 2011 एम.पी. एसएन 152*** भी अवलोकनीय है जहां यह प्रतिपादित किया है कि निर्णय पारित करने के बाद दिये गये शमन आवेदन को न्यायालय कार्यवाही पूर्ण होने के कारण विचार में नहीं ले सकता है। परंतु इस संबंध में यह अवलोकनीय है कि उक्त न्यायदृष्टांत धारा 138 परक्राम्य लिखत अधिनियम के अपराध से संबंधित है जो समन प्रकृति का मामला है जहां दण्ड के प्रश्न पर सुनने के लिये निर्णय स्थगित नहीं किया जाता है। ऐसे में उक्त न्यायदृष्टांत में प्रतिपादित विधि निर्णय पारित होने के बाद परंतु दण्डादेश से पहले प्रस्तुत आवेदन पर सुनवाई निषिद्ध नहीं करती है।

अशमनीय अपराध के आरोप में विचारण करने और गुणदोष पर शमनीय अपराध सिद्ध पाए जाने की दशा में भी विचारण न्यायालय ऐसे सिद्ध पाए गए अपराध का शमन स्वीकार कर सकता है।

अपील में अशमनीय अपराध के एवज में शमनीय अपराध के लिए दोषसिद्धी की दशा में अपराध का शमनः

माननीय सर्वोच्च न्यायालय का न्यायदृष्टांत ***रामशंकर वि. उत्तरप्रदेश राज्य, (1982) 3 एससीसी 388*** अवलोकनीय है, जहां प्रतिपादित किया गया है कि यदि अशमनीय प्रकृति के अपराध में दोषसिद्धी से अपील की सुनवाई पर अपीलीय न्यायालय अभियुक्त को शमनीय प्रकृति के अपराध में दोषी पाता है तब अपराध के शमन हेतु आवेदन स्वीकार कर सकते हैं।

क्या अभियुक्त की उपस्थिति या सहमति आवश्यक हैः

संहिता की धारा 320 से यह स्पष्ट है कि परिवादी, आहत या वह व्यक्ति जिसका उल्लेख सारणी के कॉलम 3 में किया गया है उसकी सहमति एवं स्वेच्छया से अपराध शमन किया जा सकता है। अपराध शमन करने के लिये अभियुक्त की उपस्थिति या अभियुक्त की सहमति आवश्यक नहीं है। ऐसे में अभियुक्त की अनुपस्थिति में या उसके सहमत न होने पर भी यदि परिवादी शमन हेतु आवेदन देता है तो न्यायालय ऐसे आवेदन पर विचार कर सकता है।

क्या फरियादी/आहत व्यक्ति की उपस्थिति आवश्यक हैः

संहिता की धारा 320 के अनुसार अपराध शमन सारणी के कॉलम 3 में उल्लेखित व्यक्ति की सहमति एवं स्वेच्छया से ही किया जा सकता है। परंतु कतिपय आपवादिक अवस्थाओं जैसे कि गंभीर बीमारी, दूरस्थ स्थान पर कार्यरत होने या किन्हीं अन्य आधारों पर वह व्यक्ति यदि स्वयं न्यायालय में उपस्थित नहीं हो सकता है तब भी यदि उस व्यक्ति की ओर से शपथपत्र से समर्थित स्व–हस्ताक्षरित आवेदन पत्र अपराध शमन किए जाने की परिस्थितियों, अक्षमता के आधार और स्वेच्छया आवेदन प्रस्तुत किए जाने के विवरण सहित प्रस्तुत किया जाता है और उसका कोई परिजन न्यायालय में उपस्थित होकर उस व्यक्ति की असमर्थता के तथ्य और आवेदक के द्वारा स्वेच्छया आवेदन प्रस्तुत किए जाने के कथनों की पुष्टि करता है तब उक्त आहत के न्यायालय में व्यक्तिशः उपस्थित नहीं होने पर भी न्यायालय ऐसे आवेदन पर विचार कर सकता है। इस संबंध में न्यायदृष्टांत ***रामलाल सतनामी वि. म.प्र. राज्य, 1990 एमपीएलजे 123*** अवलोकनीय है।

शमन की अनुमति के लिए उपयुक्त मामलेः

अपराधों के शमन की अनुमति देते समय न्यायालय को ***गोपाल तिवारी व अन्य वि. म.प्र. राज्य, 2010 एमपीजेआर 162*** में प्रतिपादित सिद्धांत को ध्यान में रखना चहिये। न्यायालय को शमन की अनुमति के समय उभयपक्ष के मध्य समझौते के तथ्य के अलावा ऐसे शमन का समाज पर क्या प्रभाव होगा इस तथ्य को भी विचार में रखना चाहिये। ऐसे अपराध जहां कई लोग प्रभावित हुए हैं, जैसे जन समूह के प्रति छल का अपराध, महिलाओं व बच्चों के प्रति गंभीर और आपराधिक मंतव्य से किए गए अपराध। ऐसे मामलों में आपवादिक परिस्थितियों में ही अपराध शमन की अनुमति प्रदान की

जानी चाहिये। अन्यथा अपराध के कारण समाज पर पड़ने वाले व्यापक प्रभाव को देखते हुए शमन की अनुमति से इंकार भी किया जा सकता है।

माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत ***भाग्यानदास विरूद्ध उत्तराखंड राज्य, व अन्य 2019 (2) टाईम्स 27 सुप्रीम कोर्ट*** में प्रतिपादित किया गया है कि न्यायालय का यह विवेकाधिकार है कि वह शमन हेतु प्रस्तुत आवेदन को अपराध की प्रकृति और समाज पर इसके प्रतिकूल प्रभाव को विचार में लेकर अपराध शमन की अनुमति से इंकार कर सकता है।

क्या अपराध शमन होने के बाद इसे अपील में चुनौती दी जा सकती हैः

संहिता की धारा 320 की उपधारा (8) के अनुसार शमन का प्रभाव दोषमुक्ति होगा। अर्थात् जिस प्रकार दोषमुक्ति के निर्णय या आदेश को अपील में चुनौती दी जा सकती है उसी प्रकार अपराध शमन के आधार पर पारित दोषमुक्ति के आदेश को अपील में चुनौती दी जा सकती है। इस सम्बन्ध में ***रमेश चन्द्र वि. ए.पी. झबेरी, ए.आई.आर. 1973 सुप्रीम कोर्ट 84*** एवं ***एस. के. सेफुद्दीन मुण्डल वि. राज्य व अन्य, 1983 क्रिमिनल लॉ जनरल 109*** अवलोकनीय है। उक्त दोनों मामलों में न्यायालय में अशमनीय प्रकृति के मामले में अपराध शमन की अनुमति दे दी थी। जिसे चुनौती दिये जाने पर उक्त विधि प्रतिपादित की गई है।

●

"Life is"

"Life is an opportunity benefit from it.

Life is Beauty, admire it.

Life is bliss, taste it. Life is a dream, realize it.

Life is a challenge, meet it. Life is a duty, complete it."

Mother Teresa

AUTOMATIC VACATION OF STAY ORDERS IN SIX MONTHS: IMPORT OF JUDGMENT IN ASIAN RESURFACING

– By **Yashpal Singh**
Deputy Director, MPSJA

INTRODUCTION

Cases in India can take years to be disposed of. The district judiciary account for 87% of India's pending litigation. There are multiple reasons for this pendency and one of the reasons greatly responsible for causing inordinate delay is stay of proceedings on account of interim orders of appellate and revisional courts. A greater challenge faced by the judiciary and litigants alike is the delay in determination of cases at the appellate and revisional level, which in turn leads to endless wait for determination of matters even at the trial stage. Moreso, interim orders that stay proceedings before a subordinate court are often misused by litigants as a dilatory tactic to maintain status quo in their favor. Hon'ble Supreme Court addressed this issue in ***Asian Resurfacing Road Agency v. Central Bureau of Investigation, (2018) 16 SCC 299 (Asian Resurfacing-I)***.

AUTOMATIC VACATION OF STAY ORDERS IN SIX MONTHS

The Hon'ble Supreme Court of India dealt with the issue of undue delay in trials caused by stays in ***Asian Resurfacing-I*** (supra), and noted that once a stay is granted, disposal of petition before the High Court takes a long time. Hon'ble the Supreme Court also emphasised on the accountability of the courts while granting stay of proceedings and held that such matters should be disposed of in two-three months without allowing any adjournments. To ensure a speedy disposal of such cases, Hon'ble Apex Court directed that a stay of trial proceedings before civil and criminal appellate/revisional courts ordered by a High Court or a court below High Court shall automatically expire in six months, unless extended by a speaking order.

The Apex Court issued the following directions with respect to pending cases:

1. In all pending cases where stay against proceedings of a civil or criminal trial is operating, such stay will come to an end upon the expiry of 6 (six) months from the date of the judgment of the Apex Court i.e. 28th March 2018; unless in an exceptional case, by a speaking order, such stay is extended.
2. In cases where stay is granted in future, such stay will end upon the expiry of 6 (six) months from the date of such order unless a similar extension is granted by a speaking order.

3. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized.

4. The trial court before which the order of stay of civil or criminal proceedings is produced, may fix a date not beyond 6 (six) months from the date of the order of stay so that upon expiry of the period of stay, proceedings can resume unless an order of extension of stay is produced.

This direction has been reiterated by the Hon'ble Supreme Court vide Order dated 15.10.2020 passed in ***(Asian Resurfacing Road Agency v. Central Bureau of Investigation (Asian Resurfacing-II))***. This essentially means that once the six-month period is over, the trial courts may resume the proceedings without waiting for any other intimation, unless an express order extending the stay is passed. No contempt proceedings would lie against the presiding officers of trial courts on having proceeded in terms of ***(Asian Resurfacing-I)*** (supra) after the lapse of six months.

STAY BY SUPREME COURT NOT VACATED AUTOMATICALLY

The applicability of the judgment to the orders of the Hon'ble Supreme Court was clarified in the judgment of ***Fazalullah Khan v. M. Akbar Contractor and Ors., 2019 SCC OnLine SC 1513***. While dealing with the question of eviction proceedings, the division bench held that the directions in ***Asian Resurfacing-I*** (supra) would not apply to the interim orders issued by the Hon'ble Supreme Court. It was clarified that if the interim order granted by the Hon'ble Supreme Court is not vacated and continues beyond a period of six months by reason of pendency of the appeal, it cannot be said that the interim order would automatically stand vacated.

STAY AUTOMATICALLY VACATED ONLY AT TRIAL STAGE OF LITIGATION

High Courts and Tribunals were approached with varying interpretations of the ***Asian Resurfacing-I*** (supra) judgment. Parties sought an all-encompassing interpretation of the judgment such that the stay of all kinds would stand automatically vacated. In view of this, the scope of the exception created by ***Asian Resurfacing-I*** (supra) was clarified by various High Courts.

Madhya Pradesh High Court in ***M/s Ratan Lal Gattani Sons v. Shri Parshwanath Digamber Jain Mandir, Katni*** (Order dated 05.12.2018 Second Appeal No. 1265 of 2012), has held that the law laid down in ***Asian Resurfacing-I*** (supra), would not be applicable in execution cases, where appeal is already pending and stay has been granted by the Court.

The Allahabad High Court and the Andhra Pradesh High Court have respectively in ***Dharam Vir Sood v. Savitri Devi and ors.*** (S.C.C. Revision No. 205 of 2016, Order dated 5.04.2019) and ***K. Ranga Prasad Varma v. Kotikalapudi Sitarama Murthy and ors., AIR 2020 AP 22***, held that the directions in ***Asian Resurfacing-I*** (supra) shall apply only when the trial proceedings are stayed. The courts specifically held that there will be no automatic vacation of stay on proceedings before a court post the trial stage when the judgment and decree have been passed.

HOW TO PROCEED AFTER THE EXPIRY OF PERIOD OF SIX MONTHS?

Trial courts are encountered by a question that how to proceed after the expiry of period of six months? The answer to this question lies in the judgment of Apex Court in ***Asian Resurfacing-I*** (supra). The phrases "such stay will come to an end" and "so that upon expiry of the period of stay, proceedings can resume" are clear enough to reach to the conclusion that the vacation of stay is automatic and no formal order of vacation of stay is required to be passed by the court which stayed the proceedings. The trial court in which proceedings in a case were stayed shall be competent to proceed with the further course of trial after such automatic vacation of stay, unless an order of extension of stay is produced before it.

CONCLUSION

The judgment in ***Asian Resurfacing-I*** (supra) and order in ***Asian Resurfacing-II*** (supra) of the Apex Court certainly paves the way to expedite trial-stage litigations by controlling one aspect that leads to delays. The time limit set on staying trials on account of appeals and revisions would substantially reduce the total time taken to finally conclude the trial. Auto expiration of stay orders creates a perception of informal deadlines thus reducing unnecessary and/or willful delays as well as dilatory tactics adopted by Litigants. The district judiciary will now be encouraged to conduct trials in a time bound manner.

●

LIMITATION FOR COGNIZANCE OF OFFENCES UNDER M.P. EXCISE ACT

– By **Anurag Sharma**
Civil Judge Class II, Bhind

> "The general rule of criminal justice is that "a crime never dies". The principle is reflected in the well-known maxim *nullum tempus aut locus occurrit regi* (lapse of time is no bar to Crown in proceeding against offenders). ... Normally, in serious offences, prosecution is launched by the State and a court of law has no power to throw away prosecution solely on the ground of delay. Mere delay in approaching a court of law would not by itself afford a ground for dismissing the case though it may be a relevant circumstance in reaching a final verdict."
>
> ***Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC 394***

The courts of Judicial Magistrate are often confronted with the issues relating to mandatory requirements for taking cognizance and prescribed limitation for presenting complaint/final report of offences under the M.P. Excise Act, 1915 (in short "the Act"). This article is an effort to understand the law relating to cognizance and limitation regarding the offences under the Act.

Section 61 of the Act provides for limitation in which prosecution of offences under the Act is required to be initiated alongwith certain preconditions for taking cognizance. Notably section 61 was amended in the year 2014 and reads as under;

> **61. Limitation of prosecutions.–** (1) No Court shall take cognizance of an offence punishable —
>
> (a) under Section 34 for contravention of any condition of licence, permit or pass granted under this Act, Section 37, Section 38, Section 38-A, Section 39, except on a complaint or report of the Collector or an Excise Officer not below the rank of District Excise officer as may be authorized by the Collector in this behalf;
>
> (b) under any other section of this Act other than Section 49 except on the complaint or report of an Excise Officer or Police Officer.
>
> (2) Except with the special sanction of the State Government no Judicial Magistrate shall take cognizance of any offence punishable under this Act, or any rule or order thereunder, unless the prosecution is instituted within six months from the date on which the offence is alleged to have been committed.

Section 61 can be segregated into 3 parts, namely;

(i) Offences of breach of conditions of licence issued under the Act and offences u/s 37, 38, 38A and 39 of the Act. [section 61 (1)(a)]

(ii) Other offences except section 49 the Act. [section 61(1)(a)]

(iii) Limitation and its condonation. [section 61 (2)]

Offences of breach of conditions of licence

Section 61 (A) of the Act (as amended) provides certain mandatory condition for taking cognizance of offences under the Act, same is thus;

Offences	**Mandatory Requirement**
Section 34 (in contravention of any licence, permit or pass)	Complaint or report of the Collector or an Excise Officer not below the rank of District Excise Officer
Sections 37, 38, 38-A, and 39	

It has to be keep in mind that section 61 of the Act begins with the words; "No Court shall take cognizance of an offence". Non-obstante clause makes the condition prescribed as mandatory. Impliedly, where any individual having licence to sell or manufacture or use the alleged liquor contravenes the condition of licence, then to begin the criminal proceedings against such individual for the offence punishable u/s 34 along with offences u/s 37, 38, 38-A and 39 of the Act, mandatory requirement is that such proceeding must be initiated on the complaint or report of the Collector or an Excise Officer not below the rank of District Excise Officer. It is needless to point out that this prerequisite condition is the foremost requirement and non-compliance of such conditions will vitiate the entire proceedings.

In the case of ***Gajendra Singh Bhadoria v. State of M.P., 2017 (2) MPJR 21,*** police registered offence u/s 34 and 42 of the Act at Police Station Daboh, District Bhind against a person, who was found to be in possession of 20 quarter (180 ml. each) of country made liquor without licence, who, during the investigation disclosed that, the seized country made liquor was purchased by him, from the liquor shop of the petitioner. Thereafter, police lodged FIR against two persons namely; Kallu Rathore and liquor shop owner/ petitioner. It was found that the petitioner had valid licence to sell the liquor. Hon'ble High Court of Madhya Pradesh has held as under;

> "In the instant case, the prosecution in respect of offence under section 34 of the Act has been initiated at the instance of police and therefore, learned Magistrate could not have taken cognizance of the offence in view of the provisions embodied in Section 61(1)(a) of the Act. The power of

> authorisation by the Collector is not absolute, it is circumscribed. It is not open to him to authorise any officer."

Similarly, in the case of ***Hari Singh Shivhare v. State of M.P*** (M.Cr.C. No. 2977 of 2017 Order dated 22.08.2017, High Court of Madhya Pradesh), the police registered offence u/s 34(2) and 42 of the Act against an accused person, who was found in possession of 225 cartons of country made liquor without any valid licence. An FIR was registered against the petitioner and other co-accused persons. Petitioner challenged the said proceeding on the ground that the Court could not have taken cognizance in view of section 61 of the Act. It was found that the petitioner had valid license to sell liquor, Hon'ble High Court of Madhya Pradesh has held as under;

> "It is clear that since the complaint has not been filed either by the Collector or by his authorised officer and the FIR was not lodged on the report of the Collector or any officer authorised by him in this behalf, therefore, the Court below was not authorised to take cognizance of the case. ...The petitioner being a valid licence holder is authorised to sell liquor. Even if it is assumed that co-accused are found taking the liquor seized from their possession, prima facie, it cannot be said that the petitioner has committed any offence under sections 34 & 42 of the Act as there is no breach of any condition of the licence granted in favour of the petitioner."

Similarly in the recent case of ***Girish Bhatnagar v. State of M.P., 2018 (2) MPJR 262*** it has been held that –

> "Indisputably, the police had filed the charge-sheet and the prosecution has not filed the complaint before the Trial Court as required under section 61 of the Act. As the proceedings before the Magistrate are *void ab initio*, therefore, it would be unnecessary for this Court to refuse to entertain the petition by holding that the applicant must surrender before the Magistrate. The applicant can be said to be absconding as the warrant of arrest has been issued, but when the Magistrate could not have taken cognizance of the offence, then the entire proceedings would be without jurisdiction, therefore, in the considered opinion of this Court, the present petition would be maintainable due to non-compliance of section 61 of the Act... ."

In all above said cases, the petitioners were made accused for the contravention of condition of licence/permit, on the basis of confessions of co-accused i.e statement given by the co-accused u/s 27 of the Indian Evidence Act.

Other offences (except offence u/s 49)

Where individuals are found in possession of illicit liquor without having any valid licence, in such case any criminal court can take cognizance of the said offence either on the complaint or report of an Excise Officer or Police Officer. The term "report of the police officer" makes it clear that police officer can even register the FIR and after investigation can file the final report u/s 173 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.), which leaves us with no bar in taking cognizance on such report. However, this procedure is not required to be adopted in case of offence u/s 49 of the Act which provides for penalty on officers making vexatious search, seizure, detention or arrest.

Limitation and condonation of delay

It is clear from the plain reading of section 61(2) of the Act that prescribed limitation for initiating proceeding under the Act is six months from the date of commission of offence. The terminology used in the section provides that the said prescribed limitation is for all the offences under the Act. Legislature had been clear in its view by quoting "any offence punishable under this Act, or any rule or order thereunder." This clause of the section also carries the *non-obstante* clause by saying "no judicial magistrate shall take cognizance". Thus, initiation of proceeding within six months from the date of offence is mandatory condition laid by the legislature.

However, this *non-obstante* clause is subject to one exception i.e "with the previous sanction of the State Government", which leads us to analyze that, which forum has the power to condone the delay where any complaint or report under this Act is presented after the expiry of six months.

Firstly it is expedient to note that the Act is a special law, therefore, special law will prevail over the general law. Thus, the powers conferred on the criminal courts under Chapter XXXVI of the CrPC, cannot be exercised by the courts for condoning delay at the stage of taking cognizance under this Act. Secondly, since the Act does not provide any provision for the condonation of delay for presentation of complaint/ final report, there is legislative bar on the powers of Judicial Magistrates to condone delay in initiating such proceedings. Law on this point is clear that only State has the power to condone delay and give sanction to initiate the proceeding against the offence under the Act after the expiry of prescribed limitation of six months, once the sanction is given by the State Government, Judicial Magistrate is bound to take cognizance of such

offences. Hon'ble the High Court of Madhya Pradesh in the case of ***Ramesh Tiwari v. The State of Madhya Pradesh, ILR (2017) M.P. 109*** has held as under;

> "The M.P. Excise Act, 1915 is a special enactment and its provision shall prevail over to the provisions of the Cr.P.C insofar as it relates to limitation of prosecution is concerned. It is made clear here that if an offence is committed under the Excise Act, to which special provision is specified in the statute, the provision of the general statute would apply atleast only to effect to which nothing is specified in the special enactment.
>
> It has been further held that;
>
> "In the case of ***Shankarlal and others v. State of M.P., 1991 MPLJ 445***, this Court was having an occasion to consider the effect of Section 61(1)(a) of the Act due to non-filing of complaint by the complainant for an offence under sections 37 and 38 of the Act. In the said case, the Court has considered the issue of limitation of prosecution as per section 61(2) of the Act with the aid of section 468 of Cr.P.C. In the said case, the offence was committed on 29.04.1988 while challan was filed on 09.08.1989 after more than one year. The Court observed that the limitation of prosecution is six months but by the aid of section 468 of Cr.P.C, the said period is extendable upto one year. The special sanction granted by the Excise Commissioner after one year would be of no help, and concluded that the prosecution is barred by time and the Magistrate could not take cognizance in the matter.
>
> If the analogy drawn in the case of ***Shankarlal*** (supra) is adopted by going through of section 61(2) of the Act then it is evident that for an offence punishable under the Act, the limitation of prosecution either under clause 1(a) or (b) is six months, which may be extendable with the aid of section 468 of Cr.P.C. As the case in hand falls under clause 61(a)(b) of the Act to which special sanction of the State Government or the Excise Commissioner under section 7(e) of the Act has not yet been received despite granting opportunity, however, in the context of provisions of section 61(1)(2) of the Act, the prosecution is not within limitation, and Court can not take cognizance."

In this case, law as to limitation and condonation of delay in initiating criminal proceeding against an accused under the Act has been dealt at length. It also provides for maximum period upto which courts with the aid of general law under Cr.P.C can take cognizance of offences under the Act.

Similar position of law was laid down in the case of ***Aas Mohammad v. State of M.P., 2017 (1) MPWN 31*** in the following words;

> ".....In addition to the aforesaid, looking to the provision of section 61(1) & (2) of the Act, the compliance as contemplated to get sanction after six months is mandatory by following the procedure prescribed otherwise Magistrate cannot take cognizance due to not filing the prosecution within limitation. In such circumstances, taking of cognizance after six months from the date of occurrence by the Court is contrary to the provisions of law."

Opportunity for producing sanction

Another question which is required to be considered is, whether opportunity should be given to the prosecution for presenting the sanction of the State Government? Courts may consider it appropriate to give reasonable opportunity for producing sanction of the State Government. As presentation of sanction is a procedural requirement and no offender should get away from the clutches of law without being tried merely because of lapse in procedure.

Conclusion

To conclude the above discussion, it can be said that whenever any complaint/ final report is presented before a Judicial Magistrate by the competent officers under the Act, it must be closely scrutinized on the following grounds;

1. On the ground of limitation whether prosecution has been initiated within six months from the date of offence if not, whether it is supported by sanction of the State? If yes, then after what period of time such report/complaints along with the sanction is presented before the court.
2. Against whom and under what conditions/sections the prosecution is initiated?
3. A reasonable opportunity for producing sanction of the State Government may be given to the prosecution.

●

विधिक समस्याएँ एवं समाधान

(इस स्तम्भ के अन्तर्गत मध्यप्रदेश के अधीनस्थ न्यायालयों के न्यायाधीशों द्वारा अकादमी के संज्ञान में लाई गई विधिक समस्याओं का उपयुक्त हल प्रस्तुत करने का प्रयास किया जाता है। स्तम्भ के लिये न्यायिक अधिकारी अपनी विधिक समस्याएँ अकादमी को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किये जाएंगे।)

1. क्या धारा 437–ए दण्ड प्रक्रिया संहिता के प्रावधान आज्ञापक प्रकृति के हैं ?

धारा 437–ए दण्ड प्रक्रिया संहिता किसी आपराधिक विचारण में, विचारण की समाप्ति के पूर्व अगले अपीलीय न्यायालय में अभियुक्त के उपसंजात होने के लिए जमानत बन्धपत्र निष्पादित करने की अपेक्षा करती है। प्रावधान में 'shall' शब्द का प्रयोग किया गया है इस कारण विचारण न्यायालय के समक्ष यह दुविधा उत्पन्न होती है कि क्या धारा 437–ए दण्ड प्रक्रिया संहिता में उल्लेखित प्रावधान आज्ञापक प्रकृति के हैं ?

यह सामान्य धारणा है कि जहाँ कहीं किसी विधि में 'shall' शब्द आया है तो वह आज्ञापक है और जहाँ 'may' शब्द आया है तो वह 'निदेशात्मक' है, किन्तु यह सामान्य धारणा प्रत्येक मामले में नियम के रूप में लागू नहीं की जा सकती है। कोई प्रावधान आज्ञापक प्रकृति का है या नहीं यह केवल प्रावधान में उपयोग किये गये शब्दों पर निर्भर नहीं करता है वरन् इस बात पर भी निर्भर करता है कि उक्त विधि को बनाने के पीछे विधायिका का क्या उद्देश्य है। इस l aEkkea ***राजा बुलंद शुगर कम्पनी लि. विरूद्ध द म्यूनिसिपल बोर्ड, रामपुर, ए.आई.आर. 1965 एससी 895*** अवलोकनीय है।

जहाँ तक धारा 437–ए दण्ड प्रक्रिया संहिता के प्रावधान का संबंध है, यद्यपि 'shall' शब्द का प्रयोग किया गया है किन्तु संहिता में यह उल्लेख नहीं किया गया है कि धारा 437–ए के प्रावधान के अननुपालन का परिणाम क्या होगा! यदि अभियुक्त को जमानत बन्धपत्र निष्पादित करने हेतु निर्देशित किया गया है और वह जमानत बन्धपत्र निष्पादित करने में किसी भी कारण से असफल या असमर्थ रहता है तब उसे अभिरक्षा में प्रेषित नहीं किया जा सकता है क्योंकि या तो वह जमानत पर स्वतंत्र है या अभिरक्षा में है। अभियुक्त के विरूद्ध निर्देशों के अननुपालन हेतु धारा 446 दण्ड प्रक्रिया संहिता के अन्तर्गत भी कार्यवाही नहीं की जा सकती क्योंकि बन्धपत्र की किसी शर्त का भंग नहीं हुआ है। जहाँ किसी प्रावधान के अननुपालन का कोई परिणाम निर्दिष्ट नहीं हो वहाँ ऐसे प्रावधान को आज्ञापक प्रकृति का नहीं कहा जा सकता है। इस संबंध में ***सरीना ओ.पी. विरूद्ध केरल राज्य, 2012 एससीसी ऑनलाईन केरल 31978*** अवलोकनीय है।

●

2. क्या एन.डी.पी.एस. एक्ट के अन्तर्गत उल्लेखित सभी अपराध अजमानतीय प्रकृति के है?

हाल ही में ***रिया चक्रवर्ती विरूद्ध महाराष्ट्र राज्य, आपराधिक जमानत आवेदन क्रमांक 2386/2020 आदेश दिनांक 07.10.2020*** में बाम्बे उच्च न्यायालय द्वारा एन.डी.पी.एस. एक्ट

के अन्तर्गत उल्लेखित सभी अपराधों के अजमानतीय होने के संबंध में मत प्रकट किया है जिससे विचारण न्यायालय के समक्ष भ्रम की स्थिति निर्मित हुई है।

एन.डी.पी.एस. एक्ट स्वयं अपराधों के जमानतीय अथवा अजमानतीय होने के संबंध में मौन है किन्तु धारा 37 का शीर्षक ''अपराधों का संज्ञेय और अजमानतीय होना'' भ्रम उत्पन्न करता है और इसी को आधार बनाकर ***रिया चक्रवर्ती*** (पूर्वोक्त) मामले में एन.डी.पी.एस. एक्ट के अन्तर्गत सभी अपराधों का अजमानतीय होना बताया गया है। किसी प्रावधान का शीर्षक उसकी सम्पूर्ण अन्तर्वस्तु का प्रतिनिधित्व नहीं करता है। धारा 37 की अन्तर्वस्तु में अधिनियम के सभी अपराधों का संज्ञेय होना तो उल्लेखित है किन्तु वहाँ जमानतीय अथवा अजमानतीय होने के संबंध में कोई उल्लेख नहीं किया गया है इसी तथ्य को ध्यान में रखकर बाम्बे उच्च न्यायालय आदेश द्वारा ही पूर्व में ***स्टीफन मुलर विरूद्ध महाराष्ट्र राज्य, आपराधिक याचिका क्रमांक 2939/2009 आदेश दिनांक 23.06.2010*** में एन.डी.पी.एस. एक्ट के अन्तर्गत उल्लेखित अपराधों के जमानतीय अथवा अजमानतीय होने के संबंध में दण्ड प्रक्रिया संहिता की अनुसूची लागू होने संबंधी मत व्यक्त किया गया था। इस संबंध में मध्यप्रदेश उच्च न्यायालय द्वारा ***शरद केवट विरूद्ध मध्यप्रदेश राज्य,*** (आपराधिक अपील क्रमांक 1759/2001 आदेश दिनांक 9.8.2002) में एन.डी.पी.एस. एक्ट के मामलों में दण्ड प्रक्रिया संहिता की अनुसूची को लागू करते हुए अल्प मात्रा के अपराध जमानतीय होने संबंधी मत व्यक्त किया गया है।

यद्यपि ***रिया चक्रवर्ती*** (पूर्वोक्त) में बाम्बे उच्च न्यायालय द्वारा न्यायदृष्टांत ***पंजाब राज्य विरूद्ध बलदेव सिंह, एआईआर 1999 एससी 2378 तथा उड़ीसा राज्य विरूद्ध लक्ष्मण जैना, 2002(2) एसीडी (क्रिमिनल) 567*** को आधार बनाया गया है किन्तु उक्त दोनों ही न्यायदृष्टांत मुख्य रूप से धारा 37 पर केन्द्रित नहीं है। पूर्ण रूप से पढ़ने पर यह स्पष्ट है कि उक्त मामलों में धारा 37 का केवल संदर्भ लिया गया है इस संबंध में कोई विधि प्रतिपादित नहीं की गई है। इस प्रकार ***शरद केवट*** (पूर्वोक्त) में दिये मत के अनुसार एन.डी.पी.एस. एक्ट के मामले जमानतीय/अजमानतीय होने के परिप्रेक्ष्य में दण्ड प्रक्रिया संहिता की प्रथम अनुसूची के द्वितीय भाग द्वारा अधिशासित होंगे।

●

3. क्या धारा 37 के अर्थों में आयुध अधिनियम के अन्तर्गत अपराध जमानतीय हैं ?

यह सुस्थापित है कि जब किसी विशेष विधि के अन्तर्गत अपराध के जमानतीय होने का संबंध है, यदि विशेष विधि इस संबंध में प्रावधान करती है तो विशेष विधि के प्रावधान लागू होंगे और यदि विशेष विधि इस संबंध में मौन है तो दण्ड प्रक्रिया संहिता के प्रावधान लागू होंगे।

आयुध अधिनियम के अन्तर्गत स्पष्ट प्रावधान के अभाव में दण्ड प्रक्रिया संहिता की प्रथम अनुसूची का द्वितीय भाग महत्वपूर्ण है जिसका तीसरा खण्ड तीन वर्ष से कम के दण्ड से दण्डनीय अपराध के जमानतीय होने का प्रावधान करता है। आयुध अधिनियम की धारा 37 के अनुसार, जब गिरफ्तारी पुलिस अथवा मजिस्ट्रेट से भिन्न व्यक्ति द्वारा की गई है और वह गिरफ्तार व्यक्ति को अविलम्ब निकटतम थाने के भारसाधक अधिकारी के सुपुर्द कर देता है तब पुलिस अधिकारी

गिरफ्तार व्यक्ति को बंधपत्र निष्पादित करने पर रिहा कर देता है और सम्बंधित मजिस्ट्रेट के समक्ष उपस्थित रहने हेतु निर्देशित करता है। धारा 37 आयुध अधिनियम के प्रावधान उसी दशा में लागू होंगे जब गिरफ्तारी पुलिस एवं मजिस्ट्रेट से भिन्न व्यक्ति द्वारा की गई हो। लेकिन जब गिरफ्तारी पुलिस/मजिस्ट्रेट द्वारा की जाती है धारा 37 आयुध अधिनियम के प्रावधान लागू नहीं होंगे। धारा 37 में गिरफ्तार व्यक्ति को जमानत पर छोड़ा जाना केवल सीमित उद्देश्य के लिए होता है ताकि उक्त व्यक्ति की मजिस्ट्रेट के समक्ष उपस्थिति सुनिश्चित की जा सके। इसका यह तात्पर्य नहीं है कि आयुध अधिनियम के अन्तर्गत सभी अपराध धारा 37 के प्रभाव में जमानतीय है। इस सम्बंध में राजस्थान उच्च न्यायालय का न्यायदृष्टांत ***अमर सिंह विरूद्ध राजस्थान राज्य, 2014 एससीसी ऑनलाइन 4905*** अवलोकनीय है।

●

4. मध्यप्रदेश पब्लिक ट्रस्ट एक्ट, 1951 में 'न्यायालय' तथा 'सिविल न्यायालय' से क्या तात्पर्य है?

मध्यप्रदेश पब्लिक ट्रस्ट एक्ट, 1951 की धारा 8 में रजिस्ट्रार पब्लिक ट्रस्ट के निष्कर्ष के विरूद्ध ''सिविल न्यायालय'' में वाद संस्थित किए जाने तथा धारा 12 में ''सिविल न्यायालय'' के समक्ष किसी कार्यवाही में लोक न्यास सृजन से आशयित दस्तावेज प्रस्तुत होने की दशा में अपेक्षित कार्यवाही के प्रावधान हैं। धारा 24 में ''न्यायालय'' के समक्ष अपील तथा धारा 26 एवं 27 में ''न्यायालय'' को आवेदन और उस पर सुनवाई की शक्तियों के प्रावधान किए गए हैं। स्पष्ट है कि विधायिका ने अलग–अलग संदर्भ में ''न्यायालय'' और ''सिविल न्यायालय'' का उल्लेख किया है। मध्यप्रदेश पब्लिक ट्रस्ट एक्ट, 1951 की धारा 2(1) में ''न्यायालय'' को परिभाषित किया गया है। जिसके अनुसार, न्यायालय से तात्पर्य जिले में आरंभिक अधिकारिता का प्रधान सिविल न्यायालय से है अर्थात् जिला न्यायाधीश का न्यायालय। लेकिन अधिनियम में ''सिविल न्यायालय'' को परिभाषित नहीं किया गया है।

व्यवहार न्यायालय अधिनियम, 1958 की धारा 3 विभिन्न प्रकार के सिविल न्यायालयों का वर्गीकरण करती है। जहां किसी अधिनियम में ''सिविल न्यायालय'' उल्लेखित है वहाँ साधारणतः सिविल न्यायालय से तात्पर्य व्यवहार न्यायालय अधिनियम की धारा 3 में उल्लेखित ''सिविल न्यायालय'' से है जो सिविल प्रक्रिया संहिता की धारा 15 से 20 के अनुसार, किसी वाद के लिए वाद के मूल्यांकन के अनुसार यथा व्यवहार न्यायाधीश वर्ग–2, व्यवहार न्यायाधीश वर्ग–1 अथवा जिला न्यायाधीश का न्यायालय हो सकता है अर्थात् मध्यप्रदेश पब्लिक ट्रस्ट एक्ट, 1951 की धारा 8 एवं 12 में उल्लिखित ''सिविल न्यायालय'' से तात्पर्य व्यवहार न्यायालय अधिनियम, 1958 की धारा 3 के अनुसार सामान्य ''सिविल न्यायालय'' से है। जबकि धारा 23, 26 एवं 27 में उल्लिखित ''न्यायालय'' जिला न्यायाधीश का न्यायालय है। इस संबंध में न्यायदृष्टांत ***बद्री प्रसाद विरूद्ध उमाशंकर, 1961 एमपीएलजे 394*** अवलोकनीय है।

●

5. क्या ऐसा व्यक्ति अभियोजन साक्षी के रूप में उपस्थित हो सकता है जिसका अनुसंधान के समय विवेचना अधिकारी द्वारा धारा 161 दण्ड प्रक्रिया संहिता के अंतर्गत कथन ही नहीं लिया गया है।

दण्ड प्रक्रिया संहिता, 1973 की धारा 161 साक्षी द्वारा अन्वेषण के दौरान पुलिस अधिकारी के समक्ष किये गये कथन को लेखबद्ध करने का प्रावधान करती है और यदि वह ऐसा करता है तो धारा 162 के अनुसार ऐसे कथनों को हस्ताक्षरित नहीं किया जाता है। जहां तक उक्त कथनों के उपयोग का संबंध है यदि किसी साक्षी का पूर्वतन कथन लेखबद्ध किया गया है और उसे जांच या विचारण में अभियोजन की ओर से साक्ष्य में आहूत किया जाता है तब यदि उसके कथन का कोई भाग सम्यक् रूप से साबित कर दिया गया हो तो अभियुक्त द्वारा और न्यायालय की अनुज्ञा से अभियोजन द्वारा उसका उपयोग ऐसे साक्षी का खंडन करने के लिए भारतीय साक्ष्य अभिनियम, 1872 की धारा 145 में उपबंधित रीति से किया जा सकता है।

दण्ड प्रक्रिया संहिता में उपबंधित प्रावधान से यह स्पष्ट है कि धारा 161 के तहत लेखबद्ध किया गया कथन तात्विक साक्ष्य नहीं है और उसका उपयोग केवल ऐसे साक्षी को प्रस्तुत करने पर खंडन हेतु किया जा सकता है। इसका यह तात्पर्य नहीं है कि यदि किसी साक्षी का अन्वेषण के दौरान धारा 161 के अन्तर्गत कथन लेखबद्ध नहीं किया गया है तो उसकी साक्ष्य नहीं ली जा सकती क्योंकि दण्ड प्रक्रिया संहिता की धाराएं 230 एवं 242 यह उपबंधित करती है कि न्यायालय अभियोजन के आवेदन पर किसी भी साक्षी को आहूत कर सकता है। धारा 311 यह उपबंधित करती है कि यदि प्रकरण के समुचित निराकरण के लिए किसी व्यक्ति की साक्ष्य आवश्यक है तो उसे किसी भी प्रक्रम पर आहूत किया जा सकता है।

मध्यप्रदेश उच्च न्यायालय द्वारा ***आनंद दोहरे विरूद्ध मध्यप्रदेश राज्य, 2017 (***II***) एमपीजेआर 142*** में यह प्रतिपादित किया गया है कि भले ही धारा 161 दण्ड प्रक्रिया संहिता के अधीन किसी साक्षी के कथन न लिये गये हों तब भी न्यायालय का यह कर्तव्य है कि वह अभियोजन पक्ष के समर्थन में प्रस्तुत संपूर्ण साक्ष्य को ले और ऐसे साक्षी को धारा 311 दण्ड प्रक्रिया संहिता के तहत परीक्षित किया जा सकता है। इस संबंध में न्यायदृष्टांत ***राजाराम प्रसाद यादव विरूद्ध बिहार राज्य, ए.आई.आर. 2013 एस.सी. 3081*** भी अवलोकनीय है।

●

PART - II

NOTES ON IMPORTANT JUDGMENTS

278. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 2 (1) (f) and 11 (6)

Jurisdiction for arbitration – Petitioner is a company incorporated in India; whereas the respondent is a company incorporated under the laws of Hong Kong – Once the parties have chosen Hong Kong as the place of arbitration to be administered in Hong Kong, laws of Hong Kong would govern the arbitration. The Indian courts have no jurisdiction for appointment of the arbitrator.

माध्यस्थम् एवं सुलह अधिनियम, 1996 – धाराएं 2 (1) (च) एवं 11 (6) मध्यस्थता के लिए क्षेत्राधिकार – याचिकाकर्ता भारत में निगमित कंपनी है जबकि प्रत्यर्थी हांगकांग के कानूनों के अधीन निगमित कंपनी है – जब एक बार पक्षकारों द्वारा हांगकांग का मध्यस्थता के स्थान के रूप में चयन कर लिया गया हो तब वह हांगकांग में प्रशासित किया जायेगा, हांगकांग के कानून मध्यस्थता को नियंत्रित करेंगे – मध्यस्थ की नियुक्ति के लिए भारतीय न्यायालयों को कोई क्षेत्राधिकार नहीं होगा।

Mankastu Impex Private Limited v. Airvisual Limited

Judgment dated 05.03.2020 passed by the Supreme Court in Arbitration Petition No. 32 of 2018, reported in AIR 2020 SC 1297 (Three-Judge Bench)

Relevant extracts from the judgment:

The petitioner is a company incorporated in India; whereas the respondent is a company incorporated under the laws of Hong Kong. Section 2(1)(f) of the Act defines "International Commercial Arbitration". As per Section 2(1)(f), to be an "International Commercial Arbitration", three factors ought to be fulfilled – (i) arbitration; (ii) considered as commercial under the laws in force in India; and (iii) at least one of the parties is national or habitual resident in any country other than India. In the present case, since the respondent is a company incorporated under the laws of Hong Kong, we are concerned with "International Commercial Arbitration".

The words in Clause 17.1 "without regard to its conflicts of laws, provisions and courts at New Delhi shall have the jurisdiction" do not take away or dilute the intention of the parties in Clause 17.2 that the arbitration be administered in Hong Kong. The words in Clause 17.1 do not suggest that the seat of arbitration is in New Delhi. Since Part-I is not applicable to "International Commercial Arbitrations", in order to enable the parties to avail the interim relief, Clause 17.3 appears to have been added. The words "without regard to its conflicts of laws, provisions and courts at New Delhi shall have the jurisdiction" in Clause

17.1 is to be read in conjunction with Clause 17.3. Since the arbitration is seated at Hong Kong, the petition filed by the petitioner under Section 11(6) of the Act is not maintainable and the petition is liable to be dismissed.

●

279. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 34 and 37

Setting aside an arbitral award – Patent illegality – A new ground of "patent illegality" has been inserted by Section 34 (2-A) for setting aside a domestic award – Instances of patent illegality explained.

माध्यस्थम् एवं सुलह अधिनियम, 1996 – धाराएं 34 एवं 37

माध्यस्थम् अधिनिर्णय को अपास्त करना – प्रत्यक्ष अवैधानिकता – धारा 34 (2–क) द्वारा स्थानीय अधिनिर्णय को अपास्त करने के लिए ''प्रत्यक्ष अवैधानिकता'' का एक नया आधार समाविष्ट किया गया – प्रत्यक्ष अवैधानिकता के उदाहरणों को समझाया गया।

Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd.

Order dated 22.05.2020 passed by the Supreme Court in Special Leave Petition (C) No. 3584 of 2020, reported in (2020) 7 SCC 167 (Three-Judge Bench)

Relevant extracts from the order:

Pursuant to the recommendations of the Law Commission, the 1996 Act was amended by Act 3 of 2016, which came into force w.e.f. 23.10.2015. The ground of "patent illegality" for setting aside a domestic award has been given statutory force in Section 34(2-A) of the 1996 Act. The ground of "patent illegality" cannot be invoked in international commercial arbitrations seated in India. Even in the case of a foreign award under the New York Convention, the ground of "patent illegality" cannot be raised as a ground to resist enforcement, since this ground is absent in Section 48 of the 1996 Act. The newly inserted sub-section (2-A) in Section 34, reads as follows:-

> "34. (2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.
>
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence."

The present case arises out of a domestic award between two Indian entities. The ground of patent illegality is a ground available under the statute for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or, so irrational that no reasonable person would have arrived at the same; or, the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.

●

***280. CIVIL PROCEDURE CODE, 1908 – Section 11**

***Res judicata* – Applicability of – Earlier petition dismissed under Order 7 Rule 11 without adjudicating on merits – Subsequent suit claiming same relief, not barred by *res judicata*.**

सिविल प्रक्रिया संहिता, 1908 – धारा 11

पूर्व न्याय – प्रयोज्यता – गुणागुण पर न्याय निर्णयन के बिना पूर्व याचिका आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत नामंजूर की गई – समान अनुतोष से संबंधित पश्चातवर्ती वाद *पूर्व न्याय* के द्वारा बाधित नहीं होगा।

Ramchandra Dhakad and Karulal Dhakad v. Kailashchandra Upadhyay and Gram Panchayat, Lotkhedi

Judgment dated 17.02.2020 passed by the High Court of Madhya Pradesh (Indore Bench) in Second Appeal No. 329 of 2015, reported in AIR 2020 (NOC) 712 MP

●

***281. CIVIL PROCEDURE CODE, 1908 – Section 47**

Execution of decree/award – Can only be to the extent of what has been awarded/decreed – What is awarded/decreed must be independently capable of execution – Parties entered into agreement to sale of immovable property – They referred dispute regarding price of land to sole arbitrator – Whether execution of sale deed could be directed in execution of such award? Held, No – Award was only a declaration fixing price of land – Execution of sale deed can only be directed in suit for specific performance of contract.

सिविल प्रक्रिया संहिता, 1908 – धारा 47

आज्ञप्ति/अधिनिर्णय का निष्पादन – मात्र उसी सीमा तक हो सकता है, जितना कि अधिनिर्णीत या आज्ञप्त किया गया हो – जो अनुतोष आज्ञप्त/अधिनिर्णीत किया गया हो, उसे स्वतंत्र रूप से निष्पादन योग्य होना चाहिए – पक्षकारों ने अचल संपत्ति के विक्रय का अनुबंध किया – उन्होंने भूमि के मूल्य से संबंधित विवाद को एक मात्र मध्यस्थ को रेफर किया – क्या ऐसे अधिनिर्णय के निष्पादन में विक्रयपत्र निष्पादित करने का निर्देश दिया जा सकता है? अभिनिर्धारित, नहीं – अधिनिर्णय मात्र भूमि का मूल्य निश्चित करने की एक घोषणा था – विक्रयपत्र का निष्पादन केवल अनुबंध के विनिर्दिष्ट अनुपालन के वाद में निर्देशित किया जा सकता है।

Firm Rajasthan Udyog and ors. v. Hindustan Engineering and Industries Limited

Judgment dated 24.04.2020 passed by the Supreme Court in Civil Appeal No. 2376 of 2020, reported in (2020) 6 SCC 660

●

282. CIVIL PROCEDURE CODE, 1908 – Section 89 (2) (d)

Mediation proceedings – After successful mediation, a compromise must be affected by the court after following prescribed procedure – Any order passed by mediator, cannot be executed by the execution court.

सिविल प्रक्रिया संहिता, 1908 – धारा 89 (2) (घ)

मध्यस्थता कार्यवाही – सफल मध्यस्थता के पश्चात् न्यायालय द्वारा निर्धारित प्रक्रिया का पालन करते हुए राजीनामा प्रभावशील करना चाहिए – मध्यस्थ द्वारा पारित कोई आदेश निष्पादन न्यायालय द्वारा निष्पादित नहीं किया जा सकता है।

Mohar Singh v. Gajenda Singh

Judgment dated 02.12.2019 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Petition No. 3914 of 2019, reported in 2020 (3) MPLJ 411

Relevant extracts from the judgment:

Section 89 (2) (c) of CPC speaks about judicial settlement, whereas Section 89 (2) (d) of CPC speaks about mediation. In the present case, it is not the case of the petitioner that by referring the matter to the Mediator the Civil Court had sent the matter for judicial settlement. Under these circumstances, in the considered opinion of this Court, Section 89 (2) (d) of CPC would apply, which speaks about the mediation. However, it is further provided that the Court shall affect a compromise between the parties and shall follow such procedure as may be prescribed. It is not the claim of the petitioner that after the talks were declared successful by the Mediator, any further action was taken by the petitioner before the Civil Court. Accordingly, this Court is of the considered opinion that the Executing Court did not commit any mistake by holding that since the order passed by the Mediator is not executable, therefore, the execution proceedings are not maintainable.

●

283. CIVIL PROCEDURE CODE, 1908 – Section 96, Order 23 Rules 3 and 3-A and Order 43 Rule 1-A

(i) Compromise decree; challenge to – No appeal lies against compromise decree – Separate suit challenging compromise decree is not maintainable – Only remedy is to approach the same court which recorded the compromise by way of application under proviso to Order 23 Rule 3.

(ii) Compromise decree; challenge to – When can an appeal lie? Held, a right has been given under Order 43 Rule 1-A(2) to a party who denies the compromise and invites order of Court in that regard while preferring an appeal against the decree.

(iii) Compromise decree – Challenge by a stranger to the compromise decree – Held, separate suit even by a stranger will not lie – Only court which accepted the compromise and passed the decree could examine the same.

सिविल प्रक्रिया संहिता, 1908 – धारा 96, आदेश 23 नियम 3 एवं 3–क तथा आदेश 43 नियम 1–क

(i) समझौता आज्ञप्ति को चुनौती – समझौता आज्ञप्ति के विरुद्ध कोई अपील अनुज्ञेय नहीं है – समझौता आज्ञप्ति को चुनौती देने वाला पृथक वाद पोषणीय नहीं है – एकमात्र अनुतोष उसी न्यायालय में आदेश 23 नियम 3 के परन्तुक के अधीन आवेदन प्रस्तुत करना है जिसने समझौता अभिलिखित किया हो।

(ii) समझौता आज्ञप्ति को चुनौती – कब अपील प्रस्तुत की जा सकती है? अभिनिर्धारित, आदेश 43 नियम 1–क(2) के अधीन ऐसे पक्षकार को अधिकार दिया गया है जो समझौते से इंकार करता है और आज्ञप्ति के विरूद्ध अपील प्रस्तुत कर उस संबंध में न्यायालय से आदेश की वांछा करता है।

(iii) समझौता आज्ञप्ति – एक अपरिचित द्वारा समझौता आज्ञप्ति को चुनौती – अभिनिर्धारित, एक अपरिचित द्वारा भी पृथक वाद पोषणीय नहीं होगा – मात्र वही न्यायालय जिसने समझौता स्वीकार कर आज्ञप्ति पारित की है, ऐसी आज्ञप्ति का परीक्षण कर सकता है।

Triloki Nath Singh v. Anirudh Singh (dead) through L.Rs. and ors.
Judgment dated 06.05.2020 passed by the Supreme Court in Civil Appeal No. 3961 of 2010, reported in (2020) 6 SCC 629

Relevant extracts from the judgment:

What has emerged as a legislative intent has been considered *in extenso* by this Court in ***Pushpa Devi Bhagat v. Rajinder Singh, (2006) 5 SCC 566***, after taking note of the scheme of Order 23 Rule 3 and Rule 3A added with effect from 1-2-1977. The relevant paragraphs are as under:

> "The position that emerges from the amended provisions of Order 23 can be summed up thus:
>
> (i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.
>
> (ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.
>
> (iii) *No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.*
>
> (iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8-2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code.

By introducing the amendment to the Civil Procedure Code(Amendment) 1976 w.e.f. 1st February, 1977, the legislature has brought into force Rule 3A to Order 23, which create bar to institute the suit to set aside a decree on the ground that the compromise on which decree is based was not lawful. The purpose of effecting a compromise between the parties is to put an end to the various disputes pending before the Court of competent jurisdiction once and for all.

Finality of decisions is an underlying principle of all adjudicating forums. Thus, creation of further litigation should never be the basis of a compromise between the parties. Rule 3A of Order 23 CPC put a specific bar that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. The scheme of Order 23 Rule 3 CPC is to avoid multiplicity of litigation and permit parties to amicably come to a settlement which is lawful, is in writing and a voluntary act on the part of the parties. The Court can be instrumental in having an agreed compromise effected and finality attached to the same. The Court should never be party to imposition of a compromise upon an unwilling party, still open to be questioned on an application under the proviso to Rule 3 of Order 23 CPC before the Court.

It can be further noticed that earlier under Order 43 Rule 1(m), an appeal which recorded the compromise and decide as to whether there was a valid compromise or not, was maintainable against an order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. But by the amending Act, aforesaid clause has been deleted, the result whereof is that now no appeal is maintainable against an order recording or refusing to record an agreement or compromise under Rule 3 of Order 23. Being conscious

of this fact that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1A was added to Order 43 which is as follows:

> ***"1-A. Right to challenge non-appealable orders in appeal against decree.*** — (1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.
>
> (2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded."

Thus, after the amendment which has been introduced, neither any appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3A of Order 23 CPC. As such, a right has been given under Rule 1A(2) of Order 43 to a party, who denies the compromise and invites order of the Court in that regard in terms of proviso to Rule 3 of Order 23 CPC while preferring an appeal against the decree. Section 96(3) CPC shall not be a bar to such an appeal, because it is applicable where the factum of compromise or agreement is not in dispute.

x x x

In the present case, the partition suit was filed in 1978 and after the decision of the trial Court, the matter went in first appeal and eventually, Second Appeal No. 495/86 before the High Court. During the pendency of first appeal being continuation of the suit as stated, one of the parties to the pending proceedings, namely, Sampatiya allegedly entered into a sale deed with the appellant on 6th January, 1984. Indubitably the issue regarding right, title and interest in respect of the land which was the subject matter of sale deed dated 6th January, 1984, was still inchoate and not finally decided. In that sense, the claim of the appellant was to be governed by the decision in favour of or against Sampatiya in the pending appeal. It must follow that the alleged transaction effected in favour of the appellant by a sale deed dated 6th January, 1984 ought to abide by the outcome of the said proceedings which culminated with the compromise decree passed by the High Court in Second Appeal No. 495/86 dated 15.09.1994.

Indeed, the appellant was not a party to the stated compromise decree. He was, however, claiming right, title and interest over the land referred to in the stated sale deed dated 6th January, 1984, which was purchased by him from Sampatiya judgment-debtor and party to the suit. It is well settled that the compromise decree passed by the High Court in the second appeal would relate back to the date of institution of the suit between the parties thereto. In the suit

now instituted by the appellant, at the best, he could seek relief against Sampatiya, but cannot be allowed to question the compromise decree passed by the High Court in the partition suit. In other words, the appellant could file a suit for protection of his right, title or interest devolved on the basis of the stated sale deed dated 6th January, 1984, allegedly executed by one of the party (Sampatiya) to the proceedings in the partition suit, which could be examined independently by the Court on its own merits in accordance with law. The trial Court in any case would not be competent to adjudicate the grievance of the appellant herein in respect of the validity of compromise decree dated 15th September, 1994 passed by the High Court in the partition suit.

In other words, the appellant can only claim through his predecessor Sampatiya, to the extent of rights and remedies available to Sampatiya in reference to the compromise decree. Merely because the appellant was not party to the compromise decree in the facts of the present case, will be of no avail to the appellant, much less give him a cause of action to question the validity of the compromise decree passed by the High Court by way of a substantive suit before the civil Court to declare it as fraudulent, illegal and not binding on him. Assuming, he could agitate about the validity of the compromise entered into by the parties to the partition suit, it is only the High Court, who had accepted the compromise and passed decree on that basis, could examine the same and no other Court under proviso to Rule 3 of Order 23 CPC. It must, therefore, follow that the suit instituted before the civil Court by the appellant was not maintainable in view of specific bar under Rule 3A of Order 23 CPC as held in the impugned judgment.

●

***284. CIVIL PROCEDURE CODE, 1908 – Section 151 and Order 21 Rule 89 Setting aside of auction-sale – Property of guarantor was auctioned without giving opportunity to repay the decretal amount – Guarantor had started repaying the amount before auction-sale and paid full soon after the auction-sale – Auction-sale set aside even without compliance of Order 21 Rule 89 CPC.**

सिविल प्रक्रिया संहिता, 1908 – धारा 151 एवं आदेश 21 नियम 89 नीलामी–विक्रय का अपास्त किया जाना – प्रतिभू की संपत्ति डिक्री राशि चुकाने का अवसर दिए बिना नीलाम कर दी गई थी – प्रतिभू ने नीलामी–विक्रय से पहले ही राशि का भुगतान करना प्रारंभ कर दिया था और नीलामी–विक्रय के तत्काल पश्चात पूरा भुगतान कर दिया था – आदेश 21 नियम 89 सि.प्र.सं. का पालन किए बिना भी नीलामी–विक्रय अपास्त किया जा सकता है।

Paul v. T. Mohan and anr.

Judgment dated 24.04.2020 passed by the Supreme Court in Civil Appeal No. 6146 of 2019, reported in (2020) 5 SCC 138

●

285. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10
SPECIFIC RELIEF ACT, 1963 – Section 20
Necessary or proper party – It cannot be laid down as an absolute proposition that whenever a suit for specific performance is filed a third party can never be impleaded in that suit.

सिविल प्रक्रिया संहिता, 1908 – आदेश 1 नियम 10
विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धारा 20
आवश्यक या उचित पक्षकार – ऐसा आत्यांतिक प्रतिपादना के रूप में अभिनिर्धारित नहीं किया जा सकता है कि जब भी विनिर्दिष्ट अनुपालन के लिए वाद प्रस्तुत किया जाता है तो तृतीय पक्ष कभी भी उस वाद में संयोजित नहीं किया जा सकता।

Dharmendra Raghuwanshi v. Radha Goyal and ors.
Order dated 05.06.2020 passed by the High Court of Madhya Pradesh (Indore Bench) Miscellaneous Petition No. 5417 of 2019, reported in AIR 2020 MP 113

Relevant extracts from the order:

It cannot be laid down as an absolute proposition that whenever a suit for specific performance is filed by A against B, a third party C can never be impleaded in that suit. In my opinion, if C can show a fair semblance of title or interest he can certainly file an application for impleadment. To take a contrary view would lead to multiplicity of proceedings because then C will have to wait until a decree is passed against B, and then file a suit for cancellation of the decree on the ground that A had no title in the property in dispute. Cleary, such view cannot be countenanced. Even otherwise, here in this case, as per the discussion made hereinabove the fate of the suit would directly affect the right of the petitioner, therefore, he should be allowed to be added as a party.

●

286. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11
LIMITATION ACT, 1963 – Articles 58 and 59
TRANSFER OF PROPERTY ACT, 1882 – Section 54

(i) Rejection of plaint – Object of provision explained – Frivolous litigation should be discouraged to save judicial time of Court.

(ii) Rejection of plaint – Whether documents filed with plaint can be taken into consideration for deciding application under Order 7 Rule 11? Held, Yes – When a document forms basis of plaint, it should be treated as part of the plaint.

(iii) Rejection of plaint – Test for exercising power under Order 7 Rule 11 – Held, the test is that if averments made in plaint alongwith documents relied upon are taken in its entirety, a decree would be passed? Otherwise, plaint must be rejected.

(iv) Rejection of plaint – Stage at which such powers may be exercised – Held, such powers may be exercised at any stage;

before registering the plaint, after issuing summons or before conclusion of trial.

(v) Rejection of plaint – Whether plaint may be rejected being barred by limitation? Held, Yes.

(vi) Sale deed – Whether actual payment of entire sale consideration at the time of execution of sale deed is essential for completion of sale? Held, No – Inabsence of other facts Non-payment of part of consideration will not in itself invalidate sale – Relief of cancellation of sale deed cannot be granted.

सिविल प्रक्रिया संहिता, 1908 – आदेश 7 नियम 11

परिसीमा अधिनियम, 1963 – अनुच्छेद 58 एवं 59

संपत्ति अंतरण अधिनियम, 1882 – धारा 54

(i) वादपत्र नामंजूर किया जाना – प्रावधान का उद्देश्य स्पष्ट किया गया – न्यायालय का न्यायिक समय बचाने के लिए व्यर्थ मुकदमेबाजी हतोत्साहित की जानी चाहिए।

(ii) वादपत्र नामंजूर किया जाना – क्या आदेश 7 नियम 11 के आवेदन का निराकरण करते समय वादपत्र के साथ प्रस्तुत दस्तावेजों पर विचार किया जा सकता है? अभिनिर्धारित, हाँ – जब कोई दस्तावेज वाद का आधार बनता है, तो उसे वाद का भाग माना जाना चाहिए।

(iii) वादपत्र नामंजूर किया जाना – आदेश 7 नियम 11 की शक्ति का प्रयोग करने की कसौटी – अभिनिर्धारित, कसौटी यह है कि यदि वादपत्र एवं संलग्न दस्तावेजों को उनकी संपूर्णता में लेते हैं, तो आज्ञप्ति पारित की जाएगी? – अन्यथा, वादपत्र नामंजूर किया जाना चाहिए।

(iv) वादपत्र नामंजूर किया जाना – प्रक्रम जिस पर ऐसी शक्तियों का प्रयोग किया जा सकता है – अभिनिर्धारित, किसी भी प्रक्रम पर ऐसी शक्तियों का प्रयोग किया जा सकता है; वाद पंजीयन के पूर्व, समन जारी करने के पश्चात या विचारण के समापन के पूर्व।

(v) वादपत्र नामंजूर किया जाना – क्या वादपत्र परिसीमा से बाधित होने के आधार पर नामंजूर किया जा सकता है? अभिनिर्धारित, हां।

(vi) विक्रय विलेख – क्या विक्रय विलेख के निष्पादन के समय संपूर्ण विक्रय प्रतिफल का वास्तविक भुगतान विक्रय के पूरा होने के लिए आवश्यक है? अभिनिर्धारित, नहीं – अन्य तथ्यों के अभाव में प्रतिफल के भाग का भुगतान न करना स्वयमेव विक्रय को अमान्य नहीं करेगा – विक्रय–विलेख को रद्द करने का अनुतोष प्रदान नहीं किया जा सकता है।

Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) Dead through L.Rs. and ors.

Judgment dated 09.07.2020 passed by the Supreme Court in Civil Appeal No. 9519 of 2019, reported in (2020) 7 SCC 366

Relevant extracts from the judgment:

The remedy under Order 7 Rule 11 is an independent and special remedy, wherein the Court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.

In ***Azhar Hussain v. Rajiv Gandhi, 1986 Supp SCC 315*** this Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted to waste judicial time of the court, in the following words :

> "…The whole purpose of conferment of such power is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the Court, and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation, the Court readily exercises the power to reject a plaint, if it does not disclose any cause of action."

x x x

Having regard to Order 7 Rule 14 CPC, the documents filed alongwith the plaint, are required to be taken into consideration for deciding the application under Order 7 Rule 11(a). When a document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint.

x x x

The test for exercising the power under Order 7 Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in ***Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512*** which reads as :

> "Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed."

x x x

The power under Order 7 Rule 11 CPC may be exercised by the Court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the

judgment of ***Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557***. The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in ***Azhar Hussain*** case (supra).

x x x

Section 54 of the Transfer of Property Act, 1882 provides as under :

> "54. ***"Sale" defined.***—'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

The definition of "sale" indicates that there must be a transfer of ownership from one person to another i.e. transfer of all rights and interest in the property, which was possessed by the transferor to the transferee. The transferor cannot retain any part of the interest or right in the property, or else it would not be a sale. The definition further indicates that the transfer of ownership has to be made for a "price paid or promised or part paid and part promised". Price thus constitutes an essential ingredient of the transaction of sale.

In ***Vidyadhar v. Manikrao & anr., (1999) 3 SCC 573*** this Court held that the words "price paid or promised or part paid and part promised" indicates that actual payment of the whole of the price at the time of the execution of the Sale Deed is not a *sine qua non* for completion of the sale. Even if the whole of the price is not paid, but the document is executed, and thereafter registered, the sale would be complete, and the title would pass on to the transferee under the transaction. The non-payment of a part of the sale price would not affect the validity of the sale. Once the title in the property has already passed, even if the balance sale consideration is not paid, the sale could not be invalidated on this ground. In order to constitute a "sale", the parties must intend to transfer the ownership of the property, on the agreement to pay the price either in presenti, or in future. The intention is to be gathered from the recitals of the sale deed, the conduct of the parties, and the evidence on record.

In view of the law laid down by this Court, even if the averments of the Plaintiffs are taken to be true, that the entire sale consideration had not in fact been paid, it could not be a ground for cancellation of the Sale Deed. The Plaintiffs may have other remedies in law for recovery of the balance consideration, but could not be granted the relief of cancellation of the registered Sale Deed. We find that the suit filed by the Plaintiffs is vexatious, meritless, and does not disclose a right to sue. The plaint is liable to be rejected under Order 7 Rule 11 (a).

●

287. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 14 and Order 18 Rule 4 Admissibility of documents – Admissibility of documents cannot be looked at the stage of production of document – It can be considered at the time when documents are tendered in evidence.

सिविल प्रक्रिया संहिता, 1908 – आदेश 7 नियम 14 एवं आदेश 18 नियम 4

दस्तावेजों की ग्राह्यता – दस्तावेजों की ग्राह्यता दस्तावेजों की प्रस्तुति के स्तर पर नहीं देखी जा सकती – इसे दस्तावेजों को साक्ष्य में ज्ञापित किए जाने के समय विचार में लिया जा सकता है।

Punit Agrawal v. Murarilal and ors.

Judgment dated 07.01.2020 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Petition No. 1686 of 2019, reported in 2020 (3) MPLJ 368

Relevant extracts from the judgment:

In the present case, the Court below has not rejected the application under Order 7 Rule 14 of CPC on the ground that the same has been filed with oblique motive to delay the trial. The application has been rejected only on the ground of admissibility of documents. In the considered opinion of this Court, the admissibility of documents can be considered at the time when those documents are tendered in evidence.

Accordingly, it is directed that in case, if the documents mentioned in Serial Nos.7, 8 and 12 were not the subject-matter of subsequent application filed under Order 7 Rule 14 of CPC, then the Trial Court is directed to take the documents mentioned in Serial Nos.7, 8 and 12 in the list of documents dated 14.12.2018 on record. It is made clear that the direction to take the documents should not be construed as a finding that the same are admissible in evidence. The question of admissibility shall be considered by the trial Court at the time when those documents are tendered in evidence.

●

288. CIVIL PROCEDURE CODE, 1908 – Order 14 Rule 2

Preliminary issue – Question of law – When cannot be decided as preliminary issue? Held, where dispute as to facts is necessary to be determined to give a finding on question of law, such question of law cannot be decided as preliminary issue – On the other hand, where question of law is dependent on admitted facts, court may decide it as a preliminary issue.

सिविल प्रक्रिया संहिता, 1908 – आदेश 14 नियम 2

प्रारंभिक विवाद्यक – विधि संबंधी प्रश्न – कब प्रारंभिक विवाद्यक के रूप में निर्णीत नहीं किए जा सकते हैं? अभिनिर्धारित, जहां विधि संबंधी प्रश्न पर निष्कर्ष देने के पूर्व तथ्यों संबंधी विवाद का निर्धारण आवश्यक हो, वहां ऐसे विधि संबंधी प्रश्न को प्रारंभिक विवाद्यक के रूप में निर्णीत नहीं किया जा सकता है – दूसरी ओर, जहां विधि संबंधी प्रश्न स्वीकृत तथ्यों पर निर्भर हो, न्यायालय इन्हें प्रारंभिक विवाद्यक के रूप में निर्णीत कर सकता है।

Nusli Neville Wadia v. Ivory Properties and ors.

Judgment dated 04.10.2019 passed by the Supreme Court in Special Leave Petition (C) No. 31982 of 2013, reported in (2020) 6 SCC 557 (Three – Judge Bench)

Relevant extracts from the judgment:

As per Order 14 Rule 1, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The issues are framed on the material proposition, denied by another party. There are issues of facts and issues of law. In case specific facts are admitted, and if the question of law arises which is dependent upon the outcome of admitted facts, it is open to the Court to pronounce the judgment based on admitted facts and the preliminary question of law under the provisions of Order 14 Rule 2. In Order 14 Rule 2(1), the Court may decide the case on a preliminary issue. It has to pronounce the judgment on all issues. Order 14 Rule 2(2) makes a departure and Court may decide the question of law as to jurisdiction of the Court or a bar created to the suit by any law for the time being in force, such as under the Limitation Act.

In a case question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order 14 Rule 2(2)(b). Once facts are disputed about limitation, the determination of the question of limitation also cannot be made under Order 14 Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts. In case of dispute as to facts, is necessary to be determined to give a finding on a question of law. Such question cannot be decided as a preliminary issue. In a case, the question of jurisdiction also depends upon the proof of facts which are disputed. It cannot be decided as a preliminary issue if the facts are disputed and the question of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue, is settled proposition of law either before the amendment of CPC and post amendment in the year 1976.

●

289. CIVIL PROCEDURE CODE, 1908 – Order 41 Rules 17, 19 and 21

(i) Dismissal – Absence of appellant on date of hearing – Appellate court may adjourn the case to some future date but cannot adjudicate the appeal on merits – Appellant may avail the remedy provided under Order 41 Rule 19 of the Code if appeal is dismissed in default.

(ii) *Ex-parte* decree – Passing *ex-parte* decree in absence of respondent after hearing appeal – Respondent may prefer an application for rehearing of appeal by showing sufficient cause for his non-appearance under Order 41 Rule 21 CPC.

सिविल प्रक्रिया संहिता, 1908 – आदेश 41 नियम 17, 19 एवं 21

(i) खारिजी – सुनवाई तिथि पर अपीलार्थी की अनुपस्थिति – अपीलीय न्यायालय वाद को भविष्य की किसी तिथि हेतु स्थगित कर सकता है परन्तु इसे गुणागुण पर न्यायनिर्णीत नहीं कर सकता – इस तरह के प्रकरण में अपील व्यतिक्रम में खारिज की जा सकती है और तत्पश्चात् अपीलार्थी आदेश 41 नियम 19 के अंतर्गत प्रदत्त उपचार प्राप्त कर सकता है।

(ii) *एकपक्षीय* डिक्री – जब अपील प्रत्यार्थी की अनुपस्थिति में सुनी गई है और *एकपक्षीय* डिक्री पारित की गई है – सि.प्र.सं. के आदेश 41 नियम 21 के अंतर्गत प्रत्यार्थी अपनी अनुपस्थिति का पर्याप्त कारण दर्शाते हुए अपील की पुनः सुनवाई हेतु आवेदन दे सकता है।

Quality Agencies (M/s) v. The Commissioner, Customs & Central Excise

Order dated 21.11.2019 passed by the High Court of Madhya Pradesh in CEA No. 40 of 2018, reported in ILR (2020) MP 204 (DB)

Relevant extracts from the order:

On conjoint reading of sub-rule (1) of Rule 17 and the Explanation appended thereto, it is clear that the aforesaid provision enables the Appellate Court to adjourn the case to some future date but it does not empower the Appellate Court to adjudicate the appeal on merits, or it can pass such other order as it thinks proper in the circumstances of the case. There is nothing in the Rule which provides that when the appellant does not appear and the respondent appears, the appeal shall be disposed of *ex parte*. If that were the intention of the Legislature, a clear mandate to the said effect would have been incorporated in the Rule. In fact, the intent of the Legislature in enacting this provision is that under Rule 17, the appeal should not be dismissed on merits in the absence of the appellant but it may be dismissed in default so that the appellant may avail of the remedy provided under Rule 19.

Thus, the view expressed in the preceding paragraph finds support from the aforesaid provision. Inasmuch as when an appeal is dismissed under Rule 17, the appellant is entitled to apply to the Appellate Court for re-admission of the same under Rule 19 of Order XLI of the Code, where the appellant will have an opportunity to prove that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing and if the Court is satisfied, re-admission of the appeal shall be permissible.

On the other hand, when the matter is heard in the absence of the respondent and *ex parte* decree is passed in terms of sub-rule (2) of Rule 17, Rule 21 provides for an opportunity to the respondent to prefer a similar application for rehearing of the appeal by showing sufficient cause for his non-appearance.

●

290. COMPANIES ACT, 2013 – Section 430
CIVIL PROCEDURE CODE, 1908 – Section 9
Bar to jurisdiction of Civil Court – After incorporation of new Companies Act, 2013, dispute between the parties has to be heard and decided by the Company Law – Tribunal constituted under the new Company Law is the only competent authority which has jurisdiction to decide the conflict between the parties and such dispute cannot be heard and decided by Civil Court.

कंपनी अधिनियम, 2013 – धारा 430
सिविल प्रक्रिया संहिता, 1908 – धारा 9
सिविल न्यायालय की अधिकारिता का वर्जन – जब पक्षकारों के मध्य विवाद एक कंपनी संबंधित मामला है तब नये कंपनी अधिनियम, 2013 के निगमित होने के बाद ऐसा मामला नवीन कंपनी विधि के अंतर्गत गठित कंपनी विधि अधिकरण द्वारा ही सुना व निर्णीत किया जाना चाहिए और किसी कंपनी विवाद के मामले में पक्षकारों के मध्य विवाद को निर्णीत करने की अधिकारिता व सक्षम प्राधिकारिता केवल अधिकरण को है तथा कंपनी मामलों से संबंधित ऐसे विवादों को सिविल कोर्ट द्वारा सुना एवं निराकृत नहीं किया जा सकता।

Parenteral Drugs (India) Limited v. Jagdish Mangal HUF and ors.
Order dated 11.05.2020 passed by the High Court of Madhya Pradesh (Indore Bench) in Civil Revision No. 882 of 2019, reported in AIR 2020 MP 91

Relevant extracts from the order:

The dispute between the parties is a company matter and not a civil dispute as held by the learned trial Court. After incorporation of new Companies Act, 2013 such matters has to be heard and decided by the Company Law Tribunal constituted under the new company law and is the only competent authority and has jurisdiction under the law to decide the conflict between the parties in respect of any company matter. It can hold enquiry into the matter under Section 84 of the Act, 1956 or 46 of the Companies Act, 2013 read with the Companies (Issue of Share Certificates) Rules, 1960 or The Companies (Share Capital and Debentures) Rules, 2014 and take a decision in the matter.

In all the judgments cited by the petitioner [***Shashi Prakash Khemka (dead) through LRs. v. NEPC icon (now called NEPC, India), 2019 SCC Online SC 223, Vikram Jairath v. Middleton Hotels Pvt. Ltd., 2019 SCC Online Cal, SAS Hospitality Pvt. Ltd. V. Surya Construction Pvt. Ltd., 2018 SCC Online Del 119009 and Chiranjeevi Rathnam v. Ramesh, 2017 SCC Online Mad 23049***] the disputes between the parties were found to be related to the company matters as enshrined in the Companies Act; like increase of authorized capital, allotment of shares or bonus shares, appointment of directors etc., therefore, they were relegated to the competent authorities constituted under the Companies Act. In this case also the conflict

between the parties is found to be the dispute covered under the Companies Act, therefore, applying the above dictum of law, the petition is allowed. The order of the learned Trial Court dated 22.11.2019 delivered by XV Civil Judge Class-I, Indore is set aside.

The Civil Court is directed to return the plaint to be presented before the concerned Company Law Tribunal within two months from the date of return of the plaint in accordance with law.

●

291. CONTRACT ACT, 1872 – Sections 32, 56 and 65

Interpretation of contract; Rules of – *Force majeure* clause and doctrine of frustration – Effect of – Explained – Held, document forming a written contract should be read as a whole and so far as possible as mutually explanatory – Under Indian law, doctrine of frustration discharges all the parties from future obligations – Instantly, clause 23 of the contract provided that any change in or enactment or interpretation of any law resulting in addition/ reduction of cost to Contractor shall be paid/reduced by the Contractor/Company – Price of HSD was increased by Government circular – Held, clause 23 of the contract cannot be interpreted to include executive order as law – Parties entered into the contract after mitigating the risk of such an increase – A prudent contractor take into margin such price fluctuations.

संविदा अधिनियम, 1872 – धाराएं 32, 56 एवं 65

अनुबंध के निर्वाचन के नियम – *अपरिहार्य घटना* खण्ड एवं विफलीकरण का सिद्धांत – प्रभाव – स्पष्ट किया गया – अभिनिर्धारित, लिखित अनुबंध के दस्तावेज को पूर्णता में और यथासंभव परस्पर व्याख्यात्मक रूप में पढ़ा जाना चाहिए – भारतीय विधि के अधीन विफलीकरण का सिद्धांत सभी पक्षों को भविष्य के दायित्वों से मुक्त करता है – हस्तगत मामले में संविदा के खण्ड 23 में प्रावधान था कि किसी भी विधि के परिवर्तन या अधिनियमन या व्याख्या के परिणामस्वरूप ठेकेदार की लागत में वृद्धि/कटौती का भुगतान/कमी ठेकेदार/कंपनी द्वारा किया जाएगा – एचएसडी का मूल्य शासकीय परिपत्र द्वारा बढ़ाया गया – अभिनिर्धारित, संविदा के खण्ड 23 का निर्वचन कार्यकारी आदेश को विधि के रूप में सम्मिलित करने के लिए नहीं किया जा सकता है – इस प्रकार की वृद्धि के जोखिम को कम करने के बाद ही पक्षकारों ने संविदा की थी – एक विवेकपूर्ण ठेकेदार मूल्य में ऐसे उतार–चढ़ाव को विचार में अवश्य लेता है।

South East Asia Marine Engineering and Constructions Limited (SEAMEC Limited) v. Oil India Limited

Judgment dated 11.05.2020 passed by the Supreme Court in Civil Appeal No. 673 of 2012, reported in (2020) 5 SCC 164 (Three-Judge Bench)

Relevant extracts from the judgment:

We begin by looking at the clause i.e. Clause 23, which is extracted below:

> *Subsequently Enacted Laws:*
> Subsequent to the date of price of bid opening if *there is a change in or enactment of any law or interpretation of existing law*, which results in additional cost/reduction in cost to Contractor on account of the operation under the Contract, the Company/Contractor shall reimburse/pay Contractor/ Company for such additional/reduced cost actually incurred.

In this context, the interpretation of Clause 23 of the contract by the Arbitral Tribunal, to provide a wide interpretation cannot be accepted, as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. In the case at hand, this basic rule was ignored by the Tribunal while interpreting the clause.

From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion.

●

***292. CRIMINAL PRACTICE:**

Sentencing Policy:

Criminal Law – Imposition of sentence – One of the prime objectives of criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the same is done – No straitjacket formula for sentencing an accused on proof of crime – Twin objectives of the sentencing policy is deterrence and correction – What sentence would meet the ends of justice depends on facts and circumstances of each case and court must keep in mind the gravity of the crime, motive for the crime, nature of offence and all other attendant circumstances – Proportion between crime and punishment bears the most relevant influence in determination of sentencing the crime-doer – Court has to take into consideration all aspects including social interest and conscience of the society for award of appropriate sentence.

आपराधिक विचारणः

दण्ड नीतिः

दाण्डिक विधि – सजा अधिरोपित किया जाना – दाण्डिक विधि के प्रमुख उद्देश्यों में से एक समुचित, पर्याप्त, न्यायसंगत तथा अपराध की प्रकृति व गंभीरता तथा अपराध कारित करने की रीति के आनुषंगिक, आनुपातिक सजा देना है – अपराध के साबित हो जाने पर किसी अभियुक्त को सजा देने का कोई सीधा सूत्र नहीं है – दण्डनीति के दो उद्देश्य निवारण एवं सुधार हैं – कौन सा दण्डादेश न्याय के उद्देश्य की पूर्ति करेगा यह प्रत्येक प्रकरण के तथ्यों एवं परिस्थितियों पर निर्भर करता है और न्यायालय को अपराध की गंभीरता, उद्देश्य, प्रकृति और अन्य सभी संबंधित परिस्थितियों पर विचार करना चाहिए – अपराध व सजा के मध्य का अनुपात अपराधी को सजा देने के निर्धारण हेतु सर्वाधिक प्रासंगिक प्रभाव रखता है – न्यायालय को समुचित दण्डादेश पारित करने हेतु सामाजिक हित एवं समाज के अंतःकरण सहित सभी पहलुओं को विचार में लेना चाहिए।

Bhagirath v. State of M.P.

Judgment dated 07.11.2019 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Revision No. 2100 of 2019, reported in ILR (2020) MP 210

●

293. CRIMINAL PROCEDURE CODE, 1973 – Sections 156(3), 173, 190 and 200

(i) Second complaint; maintainability of – Explained – Held, a second complaint can lie only on fresh facts or even on previous facts only if a special case is made out – E.g. where previous order was passed on incomplete record or on misunderstanding of the nature of complaint or was manifestly absurd or unjust – Where earlier complaint was disposed of on full consideration of the case on merit, second complaint is not maintainable.

(ii) Second protest petition; maintainability of – Held, second protest petition may also be entertained similarly on the principles of entertaining second complaint.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 156(3), 173, 190 एवं 200

(i) द्वितीय परिवाद; पोषणीयता – व्याख्या की गई – अभिनिर्धारित, द्वितीय परिवाद मात्र नवीन तथ्यों पर ही आ सकता है या पूर्ववत तथ्यों पर तभी आ सकता है जहां विशेष मामला बनता हो – जैसे, जहां पिछला आदेश अपूर्ण अभिलेख के आधार पर अथवा परिवाद की प्रकृति की भ्रान्ति के आधार पर पारित किया गया था या प्रत्यक्ष रूप से विवेकहीन या अन्यायपूर्ण था – जहां पूर्ववत परिवाद मामले के गुणदोष पर पूर्ण विचार कर निपटाया गया हो, वहां द्वितीय परिवाद पोषणीय नहीं है।

(ii) द्वितीय परिवाद याचिका; पोषणीयता – अभिनिर्धारित, द्वितीय परिवाद याचिका भी उन्हीं सिद्धांतों पर सुनी जा सकती है जिन पर द्वितीय परिवाद को सुना जाता है।

Samta Naidu and anr. v. State of Madhya Pradesh and anr.
Judgment dated 02.03.2020 passed by the Supreme Court in Criminal Appeal No. 367 of 2020, reported in (2020) 5 SCC 378

Relevant extracts from the judgment:

A Bench of three Judges of this Court in ***Pramatha Nath Talukdar v. Saroj Ranjan Sarkar, AIR 1962 SC 876*** discloses that a complaint under Sections 467 and 471 read with Section 109 IPC was preferred on the allegations that an unregistered deed of agreement purportedly executed on 19-1-1948, a transfer deed in respect of 1000 shares purportedly executed on 5-2-1951 and the minutes of proceedings of the Board meetings purporting to bear the signature of late Sri Nalini Ranjan Sarkar were stated to have been forged. The Chief Presidency Magistrate dismissed the complaint against which revision was preferred before the High Court of Calcutta. Said revision petition was dismissed and the matter was carried before this Court but the appeal was dismissed as withdrawn. Thereafter, another complaint was brought under very same sections. The Chief Presidency Magistrate took cognizance of the second complaint against which order, revision was preferred in the High Court of Calcutta. The matter came up before the Division Bench and the additional material projected in support of the submission that the second complaint was maintainable was dealt with by the Division Bench. The matter in that behalf was adverted to this Court as under :

> "In regard to the filing of a second complaint it held that a fresh complaint could be entertained after the dismissal of previous complaint under Section 203 of the Criminal Procedure Code when there was manifest error or manifest miscarriage of justice or when fresh evidence was forthcoming. The Bench was of the opinion that the fact in regard to the City Telephone Exchange was a new matter and because Pramode Ranjan Sarkar was not permitted to take a photostat copy of the minutes book, it was possible that his attention was not drawn to the City Telephone Exchange which was not in existence at the relevant time and that there was sufficient reason for Pramode Ranjan Sarkar for not mentioning the matter of City Exchange in his complaint. It also held that the previous Chief Presidency Magistrate Mr Chakraborty had altogether ignored the evidence of a large number of witnesses who were competent to prove the handwriting and signature of N.R. Sarkar and he had no good reasons for not accepting their evidence.

It could not be said therefore that there was a judicial enquiry of the matter before the previous Chief Presidency Magistrate; the decision was rather arbitrary and so resulted in manifest miscarriage of justice. The Court was of the opinion therefore that there was no reason to differ from the finding of the Chief Presidency Magistrate Mr Bijoyesh Mukerjee and that there was a prima facie case against the appellants."

The issue was considered by the majority judgment of this Court as under :

"Under the Code of Criminal Procedure the subject of "complaints to Magistrates" is dealt with in Chapter XVI of the Code of Criminal Procedure. The provisions relevant for the purpose of this case are Sections 200, 202 and 203. Section 200 deals with examination of complainants and Sections 202, 203 and 204 with the powers of the Magistrate in regard to the dismissal of complaint or the issuing of process. The scope and extent of Sections 202 and 203 were laid down in ***Vadilal Panchal v. Dattatraya Dulaji Gha Digaonkar, AIR 1960 SC 1113***. The scope of enquiry under Section 202 is limited to finding out the truth or otherwise of the complaint in order to determine whether process should issue or not and Section 203 lays down what materials are to be considered for the purpose. Under Section 203 of the Criminal Procedure Code the judgment which the Magistrate has to form must be based on the statements of the complainant and of his witnesses and the result of the investigation or enquiry, if any. He must apply his mind to the materials and form his judgment whether or not there is sufficient ground for proceeding. Therefore if he has not misdirected himself as to the scope of the enquiry made under Section 202 of the Criminal Procedure Code, and has judicially applied his mind to the material before him and then proceeds to make his order it cannot be said that he has acted erroneously. An order of dismissal under Section 203 of the Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interests of justice

that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into. It held therefore that a fresh complaint can be entertained where there is manifest error, or manifest miscarriage of justice in the previous order or when fresh evidence is forthcoming."

x x x

In ***Shivshankar Singh v. State of Bihar, (2012) 1 SCC 130***, a protest petition was filed by the complainant even before a final report was filed by the police. While the said protest petition was pending consideration, the final report was filed, whereafter the second protest petition was filed. Challenge raised by the accused that the second protest petition was not maintainable, was accepted by the High Court. In the light of these facts the matter came to be considered by this Court as under :

"Shri Gaurav Agrawal, learned counsel appearing for the appellant has submitted that the High Court failed to appreciate that the so-called first protest petition having been filed prior to the filing of the final report was not maintainable and just has to be ignored. The learned Magistrate rightly did not proceed on the basis of the said protest petition and it remained merely a document in the file. *The second petition was the only protest petition which could be entertained as it had been filed subsequent to the filing of the final report. …*

***

Thus, it is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, the second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit.

19. The protest petition can always be treated as a complaint and proceeded with in terms of Chapter XV CrPC. Therefore, in case there is no bar to entertain a second complaint on the same facts, in exceptional circumstances, the second

protest petition can also similarly be entertained only under exceptional circumstances. *In case the first protest petition has been filed without furnishing the full facts/particulars necessary to decide the case, and prior to its entertainment by the court, a fresh protest petition is filed giving full details*, we fail to understand as to why it should not be maintainable."

●

***294. CRIMINAL PROCEDURE CODE, 1973 – Section 157**

Delay in sending copy of FIR to Magistrate – Effect of – Reiterated, unless serious prejudice is caused to the accused, mere delay in compliance of Section 157 Cr.P.C. will not have any effect on the prosecution case – Instantly, there was delay of 11 days – However, FIR was prompt and post mortem was conducted on the same day – Held, delay is not fatal.

दण्ड प्रक्रिया संहिता, 1973 – धारा 157

मजिस्ट्रेट को प्रथम सूचना रिपोर्ट की प्रतिलिपि भेजने में विलंब – प्रभाव – पुनरोद्धरित, जब तक कि अभियुक्त पर गंभीर प्रतिकूल प्रभाव न हो, तब तक धारा 157 द.प्र.सं. के अनुपालन में विलंब से अभियोजन के मामले पर कोई प्रभाव नहीं होगा – हस्तगत मामले में, 11 दिन का विलंब था – यद्यपि, प्रथम सूचना रिपोर्ट तात्कालिक थी और उसी दिन पोस्टमार्टम भी किया गया था – अभिनिर्धारित, विलंब घातक नहीं है।

Ombir Singh v. State of Uttar Pradesh and anr.

Judgment dated 26.05.2020 passed by the Supreme Court in Criminal Appeal No. 982 of 2011, reported in (2020) 6 SCC 378 (Three–Judge Bench)

●

295. CRIMINAL PROCEDURE CODE, 1973 – Section 173 (8)

Further investigation – When the proposed accused against whom further investigation is sought, is not required to be heard at this stage, there is no question of hearing of the co-accused against whom the charge-sheet is already filed and no relief of further investigation is sought against him.

दण्ड प्रक्रिया संहिता, 1973 – धारा 173 (8)

अतिरिक्त अन्वेषण – जब प्रस्तावित अभियुक्त जिसके विरुद्ध अतिरिक्त अन्वेषण प्रार्थित किया जाता है को इस स्तर पर सुनने की आवश्यकता नहीं है, सह–अभियुक्त जिसके विरुद्ध पूर्व में ही अभियोगपत्र प्रस्तुत कर दिया गया हो और उसके विरुद्ध पश्चात्वर्ती अन्वेषण का अनुतोष प्रार्थित न किया गया हो उसे सुने जाने का प्रश्न ही नहीं है।

Satishkumar Nyalchand Shah v. State of Gujarat and ors.
Judgment dated 02.03.2020 passed by the Supreme Court in Criminal Appeal No. 353 of 2020, reported in AIR 2020 SC 1185

Relevant extracts from the judgment:

When the proposed accused against whom the further investigation is sought, namely Shri Bhaumik is not required to be heard at this stage, there is no question of hearing the appellant-one of the co-accused against whom the charge-sheet is already filed and the trial against whom is in progress and no relief of further investigation is sought against him. Therefore, the High Court is absolutely justified in rejecting the application submitted by the appellant to implead him as a party respondent in the Special Criminal Application.

●

296. CRIMINAL PROCEDURE CODE, 1973 – Section 197

(i) Sanction for prosecution of police officers – Object explained – Held, object of sanction is to protect police officers from harassive, retaliatory, revengeful and frivolous proceedings – Sanction gives upright police officers the confidence to discharge their official duties efficiently.

(ii) Sanction for prosecution – When necessary? Held, protection of sanction is available only when alleged act is reasonably connected with discharge of official duties and not cloak for objectionable act – A police officer indulging in domestic violence has no protection u/s 197 – An act done during investigation of recorded criminal case is under the colour of duty – Test to determine whether sanction is necessary or not is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty.

(iii) Sanction for prosecution – Stage at which necessity of sanction may be examined – Held, necessity of sanction may be determined at any stage of proceedings.

दण्ड प्रक्रिया संहिता, 1973 – धारा 197

(i) पुलिस अधिकारियों के अभियोजन के लिए स्वीकृति – उद्देश्य समझाया गया – अभिनिर्धारित, स्वीकृति का उद्देश्य पुलिस अधिकारियों को अपमानजनक, प्रतिशोधी, प्रतिकारी और तुच्छ कार्यवाही से बचाना है – स्वीकृति ईमानदार पुलिस अधिकारियों को उनके पदीय कर्तव्य को कुशलतापूर्वक निर्वहन करने का विश्वास दिलाती है।

(ii) अभियोजन के लिए स्वीकृति – कब आवश्यक है? अभिनिर्धारित, पूर्व–स्वीकृति की सुरक्षा तभी मिलती है जब प्रश्नगत कृत्य आधिकारिक कर्तव्यों के निर्वहन से संबंधित हो और आपत्तिजनक कृत्य का आवरण न हो – घरेलू हिंसा में लिप्त पुलिस अधिकारी को धारा 197 के अंतर्गत कोई संरक्षण नहीं है – पंजीबद्ध अपराध की अन्वेषण के दौरान किया गया कोई कृत्य कर्तव्य के निर्वहन में आता

है – यह निर्धारित करने की कसौटी कि पूर्व–स्वीकृति आवश्यक है अथवा नहीं, यह है कि क्या कृत्य आधिकारिक कर्तव्य के साथ पूरी तरह असंगत है अथवा, क्या आधिकारिक कर्तव्य के साथ उसका कोई युक्तियुक्त संबंध है।

(iii) अभियोजन के लिए स्वीकृति – प्रक्रम जब स्वीकृति की आवश्यकता का परीक्षण किया जा सकता है – अभिनिर्धारित, स्वीकृति की आवश्यकता का निर्धारण कार्यवाही के किसी भी प्रक्रम पर किया जा सकता है।

D. Devaraja v. Owais Sabeer Hussain

Judgment dated 18.06.2020 passed by the Supreme Court in Criminal Appeal No. 458 of 2020, reported in (2020) 7 SCC 695

Relevant extracts from the judgment:

Sanction of the Government, to prosecute a police officer, for any act related to the discharge of an official duty, is imperative to protect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. The requirement of sanction from the government, to prosecute would give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, from which he would be protected under Section 197 of the Code of Criminal Procedure. At the same time, if the policeman has committed a wrong, which constitutes a criminal offence and renders him liable for prosecution, he can be prosecuted with sanction from the appropriate government.

Every offence committed by a police officer does not attract Section 197 of the Code of Criminal Procedure. The protection given under Section 197 of the Criminal Procedure Code has its limitations. The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and official duty is not merely a cloak for the objectionable act. An offence committed entirely outside the scope of the duty of the police officer, would certainly not require sanction. To cite an example, a police man assaulting a domestic help or indulging in domestic violence would certainly not be entitled to protection. However, if an act is connected to the discharge of official duty of investigation of a recorded criminal case, the act is certainly under colour of duty, no matter how illegal the act may be.

If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of the protection of government sanction for initiation of criminal action against him.

The language and tenor of Section 197 of the Code of Criminal Procedure makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority.

To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction. However, if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if the policeman has exceeded the scope of his powers and/or acted beyond the four corners of law.

If the act alleged in a complaint purported to be filed against the policeman is reasonably connected to discharge of some official duty, cognizance thereof cannot be taken unless requisite sanction of the appropriate government is obtained under Section 197 of the Code of Criminal Procedure.

x x x

On the question of the stage at which the Trial Court has to examine whether sanction has been obtained and if not whether the criminal proceedings should be nipped in the bud, there are diverse decisions of this Court.

While this Court has, in ***D.T. Virupakshappa v. C. Subash, (2015) 12 SCC 231*** held that the High Court had erred in not setting aside an order of the Trial Court taking cognizance of a complaint, in exercise of the power under Section 482 of Criminal Procedure Code, in ***Matajog Dobey v. H.C. Bhari, AIR 1956 SC 44*** this Court held it is not always necessary that the need for sanction under Section 197 is to be considered as soon as the complaint is lodged and on the allegations contained therein. The complainant may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty and/or under colour of duty. However, the facts subsequently coming to light in course of the trial or upon police or judicial enquiry may establish the necessity for sanction. Thus, whether sanction is necessary or not may have to be determined at any stage of the proceedings.

●

***297. CRIMINAL PROCEDURE CODE, 1973 – Section 377**

Appeal – Appeal filed by State against inadequate sentence – Accused may plead for either acquittal or reduction of sentence although no formal appeal against judgment was preferred by him.

दण्ड प्रक्रिया संहिता, 1973 – धारा 377

अपील – राज्य द्वारा अपर्याप्त दण्ड के विरूद्ध प्रस्तुत अपील – अभियुक्त अपनी दोषमुक्ति अथवा उसके विरूद्ध अभिलिखित दण्डादेश में कमी की याचना कर सकता है, यद्यपि उसने निर्णय के विरूद्ध कोई औपचारिक अपील प्रस्तुत नहीं की है।

State of Rajasthan v. Mehram and ors.

Judgment dated 06.05.2020 passed by the Supreme Court in Criminal Appeal No. 1894 of 2010, reported in AIR 2020 SC 2089

●

***298 CRIMINAL PROCEDURE CODE, 1973 – Section 386**

Appeal against acquittal – Order of acquittal recorded by trial Court could be interfered with only if there was perversity in the finding recorded by the trial Court – Mere fact that the Appellate Court has a different opinion will not be sufficient to enable the Appellate Court to set aside the order of acquittal – When trial Court has recorded a finding of not proving the guilt, the Appellate Court should interfere only if the findings are perverse and are not possible by any reasonable person.

दण्ड प्रक्रिया संहिता, 1973 – धारा 386

दोषमुक्ति के विरूद्ध अपील – विचारण न्यायालय द्वारा अभिलिखित दोषमुक्ति के आदेश में हस्तक्षेप केवल तब किया जा सकता है जब विचारण न्यायालय द्वारा लेखबद्ध किये गये निष्कर्षों में प्रतिकूलता हो – एकमात्र यह तथ्य कि अपीलीय न्यायालय की राय भिन्न है, अपीलीय न्यायालय को दोषमुक्ति के आदेश को अपास्त करने हेतु सक्षम बनाने के लिये पर्याप्त नहीं होगा – जब विचारण न्यायालय ने दोषी साबित नहीं करने का निष्कर्ष लेखबद्ध किया हो तब अपीलीय न्यायालय को केवल तभी हस्तक्षेप करना चाहिए जब ऐसा निष्कर्ष प्रतिकूल हो एवं किसी भी युक्तियुक्त व्यक्ति द्वारा दिया जाना संभव न हो।

Satish Kumar and anr. v. State of Himachal Pradesh and anr.

Judgment dated 02.03.2020 passed by the Supreme Court in Criminal Appeal No. 19 of 2017, reported in AIR 2020 SC 1729 (Three-Judge Bench)

●

299. CRIMINAL PROCEDURE CODE, 1973 – Sections 389 and 436-A

Applicability of Section 436-A – Only that person who has undergone detention for a period of one half or more of the maximum prescribed punishment during investigation, inquiry or trial under the Code is eligible for his release on personal bond with or without sureties or bail, as the case may be – Contention that the accused remains an under-trial prisoner during the pendency of the appeal and the Appellate Court is competent to exercise the power u/s 436-A of the Code not possible.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 389 एवं 436–क

धारा 436–क की प्रयोज्यता – केवल वही व्यक्ति जो अन्वेषण, जाँच या विचारण के दौरान अधिकतम निर्धारित दण्ड के आधे या अधिक अवधि के लिए निरोध में रहा हो, वह व्यक्तिगत बंधपत्र अथवा प्रतिभू सहित या रहित प्रतिभूति पर छोड़े जाने का अधिकारी है – यह तर्क कि अपील के लंबन के दौरान अभियुक्त विचाराधीन बंदी ही रहता है और अपीलीय न्यायालय संहिता की धारा 436–क के अंतर्गत शक्तियों का प्रयोग करने में सक्षम है, ऐसा माना जाना संभव नहीं है।

Maksud Sheikh Gaffur Sheikh v. State of Maharashtra
Judgment dated 28.08.2020 passed by the High Court of Bombay (Nagpur Bench) in Criminal Application (APPA) No. 270 of 2020, reported in 2020 CriLJ 3663 (FB)

Relevant extracts from the judgment:

Even though an appeal could be said to be continuation of trial in the general sense of the term, it is not so for the purposes of Section 436-A of the Code. The word "trial" used in Section 436-A of the Code is for achieving a certain purpose, a defined goal of reducing the woes of a person in jail as he faces trial, even before he is found guilty and to a larger extent also to decongest overcrowded jails. The provision is benefic and remedial and, therefore, it must be understood in the sense which sub-serves the purpose, which remedies the situation or otherwise the remedial medicine may itself become the malady. So, the meaning plainly conveyed by Section 436-A is that its benefit is intended only for under-trial prisoners, and it is not possible to make any different or alternate construction. When two different constructions are not fairly possible, contingency of adopting that construction which favours the convict by granting him benefit of Section 436-A of the Code does not arise and so, rule of liberal construction would have no application here.

●

***300. CRIMINAL PROCEDURE CODE, 1973 – Sections 397 and 401**
Revision against order of dismissal of complaint – Grant of opportunity of hearing to accused – Held, restoration of complaint in revision being prejudice to accused, the accused has a right to be heard in such revision petition. [*Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel, (2012) 10 SCC 517* followed]

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 397 एवं 401

परिवाद खारिज करने के आदेश के विरुद्ध पुनरीक्षण – अभियुक्त को सुनवाई का अवसर दिया जाना – अभिनिर्धारित, पुनरीक्षण में परिवाद का पुनर्स्थापन अभियुक्त के हित के विपरीत है, अतः अभियुक्त को ऐसी पुनरीक्षण याचिका में सुनवाई का अधिकार है। **[*मनहरिभाई मुल्जीभाई काकड़िया वि. शैलेशभाई मोहनभाई पटेल, (2012) 10 एससीसी 517* अनुसरित]**

Subhash Sahebrao Deshmukh v. Satish Atmaram Talekar and ors.
Judgment dated 18.06.2020 passed by the Supreme Court in Criminal Appeal No. 2183 of 2011, reported in (2020) 6 SCC 625

●

301. EVIDENCE ACT, 1872 – Sections 24 and 30
(i) Confession; what constitutes? Explained – Admissibility of confession and duty of Magistrate or authority recording confession highlighted – Only voluntary confession is admissible – Whether a confession is voluntary or not is a question of fact.

(ii) Confession of a co-accused – When admissible? Held, to make confession of a co-accused admissible, there should be a joint trial.

साक्ष्य अधिनियम, 1872 – धाराएं 24 एवं 30

(i) संस्वीकृति; क्या गठित करता है? – व्याख्या की गई – संस्वीकृति की ग्राह्यता एवं संस्वीकृति अभिलिखित करने वाले मजिस्ट्रेट अथवा प्राधिकारी के कर्तव्य पर प्रकाश डाला गया – मात्र स्वैच्छिक संस्वीकृति ही ग्राह्य है – कोई संस्वीकृति स्वैच्छिक है अथवा नहीं, यह एक तथ्य का प्रश्न है।

(ii) सह–अभियुक्त की संस्वीकृति – कब ग्राह्य है? अभिनिर्धारित, सह–अभियुक्त की संस्वीकृति को ग्राह्य बनाने के लिए संयुक्त विचारण होना चाहिए।

Raja alias Ayyappan v. State of Tamil Nadu

Judgment dated 01.04.2020 passed by the Supreme Court in Criminal Appeal No. 1120 of 2010, reported in (2020) 5 SCC 118

Relevant extracts from the judgment:

The law of confession is embodied in Sections 24 to 30 of the Evidence Act, 1872. The confession is a form of admission consisting of direct acknowledgment of guilt in a criminal charge. In this connection, it is relevant to notice the observations of the Privy Council in ***Pakala Narayana Swami v. King Emperor, AIR 1939 PC 47*** which is as under :

> "... a confession must either admit in terms of an offence, or at any rate substantially all the fact which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not by itself a confession...."

It is well settled that a confession which is not free from doubt about its voluntariness, is not admissible in evidence. A confession caused by inducement, threat or promise cannot be termed as voluntary confession. Whether a confession is voluntary or not is essentially a question of fact. In ***State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600*** this Court has elaborately considered this aspect as under :

> "Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law. (Vide Taylor's Treatise on the Law of Evidence, Vol. I.) However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot

constitute evidence against the maker of the confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession, be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognising the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Evidence Act has excluded the admissibility of a confession made to the police officer."

x x x

The second question for consideration is whether the statement of two other co-accused (Exts. P-26 and P-27) is admissible in evidence.

The confession statement of the co-accused was recorded by the Superintendent of Police (PW 20) in Crime No. 160 of 1990. The appellant was absconding, hence, the proclamation order was issued by the trial court and thereafter the case was split against the appellant. A separate trial was conducted against the appellant and the impugned judgment convicting the appellant-accused has been passed by the Designated Court.

The contention of the learned Additional Advocate General, appearing for the appellant, is that the appellant cannot take the advantage of his own wrong to thwart the object and purpose of Section 15 of the TADA Act.

The learned Senior Counsel appearing for the appellant has submitted that the confession statements of the two co-accused are not at all admissible in evidence because there was no joint trial of those two co-accused with the appellant. Therefore, Ext. P-26 and Ext. P-27 are not admissible in evidence.

Section 30 of the Evidence Act mandates that to make the confession of a co-accused admissible in evidence, there has to be a joint trial. If there is no joint trial, the confession of a co-accused is not at all admissible in evidence and, therefore, the same cannot be taken as evidence against the other co-accused. The Constitution Bench of this Court in ***Kartar Singh v. State of Punjab, (1994) 3 SCC 569***, while considering the interplay between Section 30 of the Evidence Act and Section 15 of the TADA Act held that as per Section 15 of the TADA Act, after the amendment of the year 1993, the confession of the co-accused, is also a substantive piece of evidence provided that there is a joint trial.

●

302. EVIDENCE ACT, 1872 – Section 45

MEDICAL NEGLIGENCE:

(i) Medical negligence – Determination of – Application of *Bolam's* test – Ratio of *Bolam's* case is that it is enough for the doctor to show that the standard of care and skill exercised by him was that of an ordinary competent medical practitioner – Held, under changed jurisprudential thinking, standard of care as enunciated in *Bolam* must evolve in consonance with its subsequent interpretation adopted by English and Indian Courts.

(ii) Expert evidence; evidentiary value of – Expert evidence is not binding but mere advisory – It is for Court to decide as to how much weight should be attached to it – Court must apply scientific criteria furnished by expert to the facts of case and form an independent opinion.

साक्ष्य अधिनियम, 1872 – धारा 45

चिकित्सकीय उपेक्षाः

(i) चिकित्सकीय उपेक्षा – निर्धारण – *बोलम* परीक्षण की प्रयोज्यता – *बोलम* के मामले का परिमाण यह है कि चिकित्सक को यह दर्शाना पर्याप्त है कि उसके द्वारा प्रयुक्त कौशल एवं सावधानी का मानक एक साधारण सक्षम चिकित्सक के स्तर का था – अभिनिर्धारित, परिवर्तित न्यायशास्त्रीय विचार के अनुसार, *बोलम* में अपेक्षित सावधानी का मानक इंग्लिश और भारतीय न्यायालयों द्वारा अपनाई गई बाद की व्याख्या के अनुरूप होना चाहिए।

(ii) विशेषज्ञ की साक्ष्य का साक्ष्यिक मूल्य – विशेषज्ञ की साक्ष्य बाध्यकारी प्रकृति की नहीं होती है किन्तु यह मात्र सलाह है – यह न्यायालय को तय करना है कि उस पर कितना मूल्य दिया जाना चाहिए – न्यायालय को विशेषज्ञ द्वारा उपलब्ध कराए गए वैज्ञानिक मानदंड को मामले के तथ्यों पर लागू कर एक स्वतंत्र मत बनाना चाहिए।

Maharaja Agrasen Hospital and ors. v. Master Rishabh Sharma and ors.

Judgment dated 16.12.2019 passed by the Supreme Court in Civil Appeal No. 6619 of 2016, reported in (2020) 6 SCC 501

Relevant extracts from the judgment:

A perusal of the AIIMS Report 11.05.2012 shows that it was premised on the alleged entry recorded by Appellant No.4 - Dr. S.N. Jha on 26.04.2005, which records that ROP test was conducted, and no ROP was detected. We have already recorded a finding that the entry made in the Treatment Sheet (at pages 100 and 102 of the original Medical Records) seems to be an interpolation done subsequently to cover up the failure of the Hospital and the Doctors to advise or conduct the mandatory ROP check-up and follow-up protocol. The

second point contained in the AIIMS Report that the baby was not taken to the Paediatrics OPD is wholly fallacious. We have seen the medical records, and find that the baby was, in fact, taken to the Paediatrics Unit of the General OPD. Hence, the basis of the Report is misconceived, and cannot be relied upon.

It is well-settled that a Court is not bound by the evidence of an expert, which is advisory in nature. The court must derive its own conclusions after carefully sifting through the medical records, and whether the standard protocol was followed in the treatment of the patient. The duty of an expert witness is to furnish the Court with the necessary scientific criteria for testing the accuracy of the conclusions, so as to enable the Court to form an independent opinion by the application of this criteria to the facts proved by the evidence of the case. Whether such evidence could be accepted or how much weight should be attached to it is for the court to decide.

We accept the view taken by the National Commission in disregarding the opinion of the Medical Board constituted by AIIMS.

x x x

Medical negligence is the breach of a duty of care by an act of omission or commission by a medical professional of ordinary prudence. Actionable medical negligence is the neglect in exercising a reasonable degree of skill and knowledge to the patient, to whom he owes a duty of care, which has resulted in injury to such person. The standard to be applied for adjudging whether the medical professional charged has been negligent or not, in the performance of his duty, would be that of an ordinary competent person exercising ordinary skill in the profession. The law requires neither the very highest nor a very low degree of care and competence to adjudge whether the medical professional has been negligent in the treatment of the patient.

In earlier judgments, this Court referred to the ***Bolam*** test laid down in ***Bolam v. Friern Hospital Management Committee, (1957) 2 All ER 118***. In this case, the doctor treating the patient suffering from mental illness was held not to be guilty of medical negligence by the Queen's Bench Division for failure to administer muscle-relaxant drugs and using physical restraint in the course of electro-convulsive therapy. McNair, J., in his opinion, explained the law in the following words:

> "… where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

The ratio of the ***Bolam*** case (supra) is that it is enough for the doctor to show that the standard of care and the skill exercised by him was that of an ordinary competent medical practitioner exercising an ordinary degree of professional skill. McNair, J., held that:

> "… he [a Doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."

In recent years, the *Bolam* test has been discarded by the courts in England. In ***Bolitho v. City and Hackney Health Authority, 1997 4 All ER 771***, a five judge bench of the House of Lords discarded it.

Lord Browne-Wilkinson, in ***Bolitho*** case (supra) speaking for the bench, in his opinion stated that despite a body of professional opinion approving the doctor's conduct, a doctor can be held liable for negligence, if it is demonstrated that the professional opinion is not capable of withstanding logical analysis.

A five judge bench of the Australian High Court in ***Rogers v. Whitaker, (1992) 109 Aus LR 625*** identified the basic flaw involved in approaching the standard of duty of care of a doctor as laid down in ***Bolam*** (supra).

A seven-judge bench of the U.K. Supreme Court in a more recent judgment delivered in ***Montgomery v Lanarkshire Health Board, 2015 AC 1430*** traced the changes in the jurisprudence of medical negligence in England, and held that "patients are now widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession". The Supreme Court noted that the courts have tacitly ceased to apply the ***Bolam*** test in relation to the advice given by the doctor to their patients.

This Court in ***V. Kishan Rao v. Nikhil Super Speciality Hospital, (2010) 5 SCC 513*** has opined that the ***Bolam*** test requires re-consideration.

More recently, this Court in ***Arun Kumar Manglik v. Chirayu Health and Medicare (P) Ltd., (2019) 7 SCC 401*** has held that the standard of care as enunciated in Bolam (supra) must evolve in consonance with its subsequent interpretation adopted by English and Indian courts.

●

303. EVIDENCE ACT, 1872 – Section 65

Secondary evidence; admissibility of – For admission of secondary evidence, foundational evidence has to be given as to why original evidence has not been produced – Further, foundational facts have to be established for the existence of original – Instantly, original will was allegedly handed over to Revenue Officials for mutation – One Revenue Official admitted that there was another Revenue Official (Patwari) and he is unaware whether Will was given to him – Scribe of the original Will stated to have scribed the Will – Held,

foundational facts as to existence and right to give secondary evidence are established – Further held, admission of secondary evidence by Court will not attest the authenticity, truthfulness and genuineness of the document which will have to be established during trial.

साक्ष्य अधिनियम, 1872 – धारा 65

द्वितीयक साक्ष्य की ग्राह्यता – द्वितीयक साक्ष्य की ग्राह्यता के लिए ऐसी आधारभूत साक्ष्य दी जानी होगी कि क्यों मूल साक्ष्य प्रस्तुत नहीं की गई है – इसके अतिरिक्त, मूल के अस्तित्व में होने संबंधी आधारभूत तथ्यों को स्थापित करना होगा – हस्तगत मामले में, मूल वसीयत कथित रूप से राजस्व अधिकारियों को नामांतरण के लिए सुपुर्द की गई थी – एक राजस्व अधिकारी ने स्वीकार किया कि वहाँ एक अन्य राजस्व अधिकारी (पटवारी) भी था और वह इस बात से अनभिज्ञ है कि क्या उसे वसीयत दी गई थी – मूल वसीयत के रचयिता ने भी वसीयत लिखना अभिकथित किया – अभिनिर्धारित, असल के अस्तित्व और द्वितीयक साक्ष्य प्रस्तुत करने के अधिकार के लिए आधारभूत तथ्य स्थापित होते हैं – आगे अभिनिर्धारित, न्यायालय द्वारा द्वितीयक साक्ष्य की ग्राह्यता दस्तावेज की सत्यता, विश्वसनीयता और वास्तविकता को अभिप्रमाणित नहीं करती है, जिसे विचारण के दौरान स्थापित करना होगा।

Jagmail Singh and anr. v. Karamjit Singh and ors.

Judgment dated 13.05.2020 passed by the Supreme Court in Civil Appeal No. 1889 of 2020, reported in (2020) 5 SCC 178

Relevant extracts from the judgment:

A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original evidence has not been furnished.

It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In ***H. Siddiqui v. A. Ramalingam, (2011) 4 SCC 240***, this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence.

In the case at hand, it is imperative to appreciate the evidence of the witnesses as it is only after scrutinising the same opinion can be found as to the existence, loss or destruction of the original will. While both the revenue officials failed to produce the original will, upon perusal of the cross-examination it is clear that neither of the officials has unequivocally denied the existence of the will. PW 3 Rakesh Kumar stated during his cross-examination that there was another patwari in that area and he was unaware if such will was presented before the other patwari. He went on to state that this matter was 25 years old and he was no longer posted in that area and, therefore, could not trace the will. Moreover, PW 4 went on to admit that, "there was registered will which was entered. There was a ***katchi*** (unregistered) will of Babu Singh was handed over to Rakesh Kumar Patwari for entering the mutation…". Furthermore, the prima facie evidence of existence of the will is established from the examination of PW 1, Darshan Singh, who is the scribe of the will in question and deposed as under:

> "I have seen the will dated 24-1-1989 which bears my signature as scribe and as well as witness."

In view of the aforesaid factual situation prevailing in the case at hand, it is clear that the factual foundation to establish the right to give secondary evidence was laid down by the appellants and thus the High Court ought to have given them an opportunity to lead secondary evidence. The High Court committed grave error of law without properly evaluating the evidence and holding that the prerequisite condition i.e. existence of will remained unestablished on record and thereby denied an opportunity to the appellants to produce secondary evidence.

Needless to observe that merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law.

The appellants would be entitled to lead secondary evidence in respect of the will in question. It is, however, clarified that such admission of secondary evidence automatically does not attest to its authenticity, truthfulness or genuineness which will have to be established during the course of trial in accordance with law.

●

***304. EVIDENCE ACT, 1872 – Section 65-B**

(i) Electronic evidence; admissibility of – Reference made to larger Bench decided – Held, Sections 65-A and 65-B of the Act are complete code in themselves in relation to admissibility of electronic evidence – Requirement of certificate in terms of Section 65-B(4) with an output of electronic record is mandatory. [*Shafhi Mohammad v. State of Himachal Pradesh, (2018) 2 SCC 801* overruled and *Tomaso Bruno v. State of U.P., (2015) 7 SCC 178* held *per incuriam*.]

(ii) Electronic evidence; admissibility of – Conclusion of the Bench may be deduced in following points:

1. **Where original electronic record is produced in Court, it is admissible without any certificate u/s 65-B(4) of the Evidence Act.**
2. **Every output of electronic record is admissible in evidence without production or proof of original, provided it is supported by a certificate as contemplated u/s 65-B(4) of a competent person.**
3. **It would be sufficient if such certificate is stated to the best of knowledge "or" belief of the person issuing the certificate.**
4. **Oral evidence in lieu of such certificate is not admissible.**
5. **Appropriate stage for production of certificate in criminal cases is the stage of filing of charge-sheet. Similarly, in civil cases, such certificate must be produced at the time of presentation of plaint or written statement, as the case may be, subject of course, to the provisions of Order VII Rule 14 and Order VIII Rule 1A CPC.**
6. **A party who is not in possession or control of the electronic device from which output of electronic record is reproduced may apply to the Court seeking directions for production of the certificate from requisite person.**
7. **Court may, at its discretion, allow such an application of a party and direct the person concerned to produce such certificate. Such powers are vested in every civil and criminal Court by virtue of Sections 91 and 311 of CrPC, Order XVI CPC and Section 165 of the Evidence Act.**
8. **Where a party has done everything possible to obtain the necessary certificate from a third party over whom he has no control, including through Court, then he may be relieved of the requirement to produce certificate. Such output of electronic record would be admissible without certificate u/s 65-B(4).**
9. **All the intermediaries shall maintain the original electronic records where its output is seized during investigation in a segregated and secured manner.**
10. **Private individuals are not required to preserve the original electronic record.**

[*For detailed discussion, kindly see JOTI Journal Oct 2020 Issue, Part I, page 161]

साक्ष्य अधिनियम, 1872 – धारा 65–ख

(i) इलेक्ट्रॉनिक साक्ष्य की ग्राह्यता – वृहद पीठ को प्रेषित संदर्भ निष्कर्षित किया गया – अभिनिर्धारित, धारा 65–क और 65–ख इलेक्ट्रॉनिक साक्ष्य की ग्राह्यता के संबंध में अपने आप में पूर्ण संहिता हैं – इलेक्ट्रॉनिक रिकॉर्ड के आउटपुट के साथ धारा 65–ख(4) के द्वारा अपेक्षित प्रमाण पत्र की आवश्यकता अनिवार्य है। [*शफ़ी मोहम्मद वि. हिमाचल प्रदेश राज्य, (2018) 2 एससीसी 801 उलट दिया गया एवं टोमासो ब्रूनो वि. उ.प्र. राज्य, (2015) 7 एससीसी 178 पर इन्क्यूरियम* घोषित]

(ii) इलेक्ट्रॉनिक साक्ष्य की ग्राह्यता – न्यायालय के निष्कर्ष निम्नलिखित बिंदुओं में निरूपित किए जा सकते हैं :

(1) जहाँ न्यायालय में मूल इलेक्ट्रॉनिक रिकॉर्ड प्रस्तुत किया जाता है, यह बिना किसी प्रमाण पत्र के साक्ष्य अधिनियम की धारा 65–ख(4) के अधीन ग्राह्य होगा।

(2) इलेक्ट्रॉनिक रिकॉर्ड का प्रत्येक आउटपुट मूल रिकॉर्ड को प्रस्तुत एवं प्रमाणित किए बिना साक्ष्य में ग्राह्य होगा, बशर्ते कि यह एक सक्षम व्यक्ति के द्वारा जारी धारा 65–ख(4) के अपेक्षित प्रमाण पत्र द्वारा समर्थित हो।

(3) ऐसे प्रमाण पत्र को जारी करने वाले व्यक्ति के ज्ञान (या) विश्वास के आधार पर अभिकथित किया जाना पर्याप्त होगा।

(4) ऐसे प्रमाण पत्र के स्थान पर मौखिक साक्ष्य ग्राह्य नहीं होगी।

(5) आपराधिक मामलों में प्रमाण पत्र के प्रस्तुति का उपयुक्त प्रक्रम अभियोग–पत्र प्रस्तुत करने का चरण है। इसी प्रकार सिविल मामलों में यह प्रमाण पत्र, आदेश 7 नियम 14 एवं आदेश 8 नियम 1–ए सि.प्र.सं. के प्रावधानों के अध्याधीन रहते हुए, वादपत्र या लिखित कथन प्रस्तुति के समय प्रस्तुत किया जाना चाहिए।

(6) एक पक्षकार जो ऐसे इलेक्ट्रॉनिक उपकरण के आधिपत्य या नियंत्रण में नहीं है, जिससे इलेक्ट्रॉनिक रिकॉर्ड के आउटपुट का उत्पादन किया गया हो, तो ऐसा व्यक्ति न्यायालय को आवेदन कर सक्षम व्यक्ति से प्रमाण पत्र प्रस्तुत करने के निर्देश जारी करा सकता है।

(7) न्यायालय अपने विवेक से किसी पक्षकार के ऐसे आवेदन को स्वीकार सकता है और संबंधित व्यक्ति को ऐसा प्रमाण पत्र प्रस्तुत करने का निर्देश दे सकता है। ऐसी शक्तियां प्रत्येक सिविल और आपराधिक न्यायालय में द.प्र.सं. की धारा 91 व 311, सि.प्र.सं. के आदेश 16 और साक्ष्य अधिनियम की धारा 165 के द्वारा निहित हैं।

(8) जहां एक पक्ष ने तीसरे पक्ष से, जिस पर उसका कोई नियंत्रण नहीं है, आवश्यक प्रमाण पत्र प्राप्त करने के लिए हर संभव प्रयास कर लिया हो, जिसमें न्यायालय का माध्यम भी सम्मिलित है, तो उसे प्रमाण पत्र प्रस्तुत

करने की अनिवार्यता से मुक्त किया जा सकता है। इलेक्ट्रॉनिक रिकॉर्ड का ऐसा आउटपुट धारा 65–ख(4) के प्रमाण पत्र के बिना भी ग्राह्य होगा।

(9) जहां इलेक्ट्रॉनिक रिकॉर्ड का आउटपुट किसी अनुसंधान कार्यवाही के दौरान जप्त किया जाता है, वहां प्रत्येक मध्यवर्ती मूल इलेक्ट्रॉनिक रिकॉर्ड को एक पृथक और सुरक्षित तरीके से अनुरक्षित रखेंगे।

(10) निजी व्यक्तियों को मूल इलेक्ट्रॉनिक रिकॉर्ड को संरक्षित करने की आवश्यकता नहीं है।

[विस्तृत व्याख्या के लिये कृपया जोती जर्नल, अक्टूबर 2020 अंक भाग–I पेज 161 देखें]

Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and ors.

Judgment dated 14.07.2020 passed by the Supreme Court in Civil Appeal No. 20825 of 2017, reported in (2020) 7 SCC 1 (Three – Judge Bench)

●

305. EVIDENCE ACT, 1872 – Section 101

Burden of proof – Liability of – When both parties come before the court with their pleadings, they are liable to prove their case and if evidence is led by both parties, under such circumstances, question of burden of proof loses its significance.

साक्ष्य अधिनियम, 1872 – धारा 101

सबूत के भार – उत्तरदायित्व – जब दोनों पक्षकार न्यायालय के समक्ष अपने–अपने अभिवचनों के साथ आते हैं, वे अपने मामले को साबित करने के लिये उत्तरदायी हैं, और यदि दोनों पक्षों द्वारा साक्ष्य प्रस्तुत की जाती हैं, तब ऐसी स्थिति में सबूत के भार का प्रश्न अपना महत्व खो देता है।

Kastur Chand Jain (since dead) through L.R. Ashish Jain v. Keshri Singh

Judgment dated 12.09.2019 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Second Appeal No. 422 of 2009, reported in 2020 (3) MPLJ 414

Relevant extracts from the judgment:

When both the parties, i.e. plaintiff and defendant come before the Court with the respective pleadings, they are equally liable to prove their case pleaded in the pleadings and if evidence being led by both the parties, then in such circumstances, question of burden of proof loses its significance. See: ***Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi and ors., AIR 1960 SC 100 and Arumugham and ors. v. Sundarambel & anr., (1999) 4 SCC 350*** are worth consideration in this regard because even if the controversy is seen from this

angle then also defendant had to prove the pleadings regarding unsuitability of accommodation for residential purpose which he purchased, if he wanted to wriggle out of the ambit of Section 12 (1)(i) of the Act of 1961. In absence thereof, Section 12 (1)(i) of the Act of 1961 would be a source of travesty of justice and no landlord would able to get his tenanted premises evicted from a tenant because suitability is a very subjective term and once the tenant has accepted the existence of alternative accommodation owned and possessed by him, then it is his duty to prove that the said accommodation is not suitable for residence. Tenant cannot be given premium for his own omission.

●

306. EVIDENCE ACT, 1872 – Sections 138 and 146

Witness – Cross-examination – In order to impeach the truthfulness of his statement, the witness must be cross-examined to seek any explanation in respect of a version, which accused wants to rely upon – A party intending to bring evidence to impeach or contradict the testimony of a witness must be given an opportunity of explanation.

साक्ष्य अधिनियम 1872 – धाराएं 138 एवं 146

साक्षी – प्रतिपरीक्षण – साक्षी के कथन की सत्यता को आक्षेपित करने के अनुक्रम में उस कथन के संबंध में जिसका अभियुक्त अवलंब लेना चाहता है, स्पष्टीकरण प्राप्त करने हेतु अभियुक्त की ओर से प्रतिपरीक्षण अवश्य किया जाना चाहिए – एक पक्ष जो साक्षी की परिसाक्ष्य को आक्षेपित करने या उसका खंडन करने हेतु साक्ष्य प्रस्तुत करना चाहता है, उसे स्पष्टीकरण प्रस्तुत करने का अवसर अवश्य दिया जाना चाहिए।

Arvind Singh v. State of Maharashtra

Judgment dated 24.04.2020 passed by the Supreme Court in Criminal Appeal No. 640 of 2016, reported in AIR 2020 SC 2451 (Three-Judge Bench)

Relevant extracts from the judgment:

The prosecution is required to bring home the guilt beyond reasonable doubt. It is open to an accused to raise such reasonable doubt by cross-examination of the prosecution witnesses to discredit such witness in respect of truthfulness and veracity. However, where the statement of prosecution witnesses cannot be doubted on the basis of the touchstone of truthfulness, contradictions and inconsistencies, and the accused wants to assert any particular fact which cannot be made out from the prosecution evidence, it is incumbent upon the accused to cross-examine the relevant witnesses to that extent. The witness, in order to impeach the truthfulness of his statement, must be cross-examined to seek any explanation in respect of a version, which accused wants to rely upon rather to raise an argument at the trial or appellate stage to infer a fact when the opportunity given was not availed of as part of fair play while appreciating

the statement of the witnesses. Thus, we hold that a party intending to bring evidence to impeach or contradict the testimony of a witness must give an opportunity to explain or answer when the witness is in the witness box.

●

307. HINDU LAW:

EVIDENCE ACT, 1872 – Sections 21, 58, 101, 102 and 115

(i) Property of Hindu Undivided Family – Proof of – Burden lies upon the person who alleges the existence of HUF – Not only jointness of family is to be proved but it has also to be proved that property belongs to the HUF, unless there is material on record to show that property is nucleus of the joint Hindu family or that it was purchased from the funds of nucleus.

(ii) Admission – Evidentiary value of – Held, an admission is not conclusive proof of the matter stated therein – It is a piece of evidence which can be proved to be erroneous or untrue – It may become conclusive by estoppel if the person to whom it was made acts upon it to his detriment.

(iii) Doctrine of election and doctrine of approbate or reprobate – Held, where a party knowingly accepts the benefit of a document, it is estopped to deny the validity or binding effect of such document on him – One cannot blow both hot and cold at the same time.

हिन्दू विधिः

साक्ष्य अधिनियम, 1872 – धाराएं 21, 58, 101, 102 एवं 115

(i) हिन्दू अविभाजित कुटुम्ब की संपत्ति – साबित किया जाना – भार उस व्यक्ति पर निहित है जो हिन्दू अविभाजित कुटुम्ब के अस्तित्व का दावा करता है – न केवल परिवार की संयुक्तता साबित की जानी होगी, बल्कि यह भी साबित करना होगा कि संपत्ति हिन्दू अविभाजित कुटुम्ब की है, जब तक कि अभिलेख पर यह दिखाने के लिए सामग्री हो कि संपत्ति संयुक्त हिन्दू परिवार का एक केन्द्रक है अथवा यह केन्द्रक के कोष से अर्जित की गई है।

(ii) स्वीकृति – साक्ष्यिक मूल्य – अभिनिर्धारित, एक स्वीकृति उसमें उल्लिखित अंतर्वस्तु का निश्चायक प्रमाण नहीं है – यह एक साक्ष्य है जो त्रुटिपूर्ण या असत्य साबित किया जा सकता है – यह विबंध के सिद्धांत द्वारा निश्चायक हो सकता है यदि वह व्यक्ति जिसे स्वीकृति की गई थी, इसके आधार पर अपने हित के विपरीत कार्रवाई करता है।

(iii) निर्वाचन का सिद्धांत और अनुमोदन या प्रत्यावर्तन का सिद्धांत – अभिनिर्धारित, जहां एक पक्षकार सजगता से किसी दस्तावेज के लाभ को स्वीकार करता है, तो वह उस दस्तावेज की वैधता या बाध्यकारी प्रभाव से इनकार करने के लिए विबंधित हो जाता है – कोई भी ऊष्ण एवं शीत दोनों एक साथ नहीं बहा सकता है।

Bhagwat Sharan (Dead) through LRs v. Purushottam and ors.

Judgment dated 03.04.2020 passed by the Supreme Court in Civil Appeal No. 6875 of 2008, reported in (2020) 6 SCC 387

Relevant extracts from the judgment:

The law is well settled that the burden is on the person who alleges that the property is a joint property of an HUF to prove the same. Reference in this behalf may be made to the judgments of this Court in ***Bhagwan Dayal v. Reoti Devi1, AIR 1962 SC 287***. Both the parties have placed reliance on this judgment. In this case this Court held that the general principle is that a Hindu family is presumed to be joint unless the contrary is proved. It was further held that where one of the coparceners separated himself from other members of the joint family there was no presumption that the rest of coparceners continued to constitute a joint family. However, it was also held that at the same time there is no presumption that because one member of the family has separated, the rest of the family is no longer a joint family. However, it is important to note that this Court in ***Bhagwati Prasad Sah and ors. v. Dulhin Rameshwari Kuer and ors., 1951 SCC 486*** held as follows:-

> "... Except in the case of reunion, the mere fact that separated coparceners chose to live together or act jointly for purposes of business or trade or in their dealings with properties, would not give them the status of coparceners under the Mitakshara law."

x x x

An admission made by a party is only a piece of evidence and not conclusive proof of what is stated therein. It is in this light that we have to examine the admission made by Hari Ram and his brothers while filing the written statement to the suit filed by Seth Budhmal. In paragraph 6 the averment was that the defendants constituted trading Joint Hindu Family. It is obvious that the admission was with regard to a trading family and not HUF. In view of the law cited above, it is clear that not only jointness of the family has to be proved but burden lies upon the person alleging existence of a joint family to prove that the property belongs to the joint Hindu family unless there is material on record to show that the property is the nucleus of the joint Hindu family or that it was purchased through funds coming out of this nucleus. In our opinion, this has not been proved in the present case. Merely because the business is joint would not raise the presumption that there is a Joint Hindu Family. As far as paragraph 8 is concerned in our view there is no clear-cut admission. The allegation made was that the minors were represented by defendant nos. 1-3, who were head of their respective branches. In reply to this it was stated that defendant nos.1-3 were neither the head or the karta, nor the mortgage transaction was made in that capacity. This admission cannot be said to be an unequivocal admission of there being a joint family.

In ***Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593*** which is the *locus classicus* on the subject it was held as follows:-

> "An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel."

x x x

It is also not disputed that the plaintiff and defendant nos. 1-3 herein filed suit for eviction of an occupant in which he claimed that the property had been bequeathed to him by Hari Ram. According to the defendants the plaintiff having accepted the Will of Hari Ram and having taken benefit of the same, cannot turn around and urge that the Will is not valid and that the entire property is a joint family property. The plaintiff and defendant nos. 1-3 by accepting the bequest under the Will elected to accept the will. It is trite law that a party cannot be permitted to approbate and reprobate at the same time. This principle is based on the principle of doctrine of election. In respect of Wills, this doctrine has been held to mean that a person who takes benefit of a portion of the Will cannot challenge the remaining portion of the Will. In The ***Rajasthan State Industrial Development and Investment Corpn. and anr. v. Diamond and Gem Development Corporation Ltd. and anr, AIR 2013 SC 1241*** this Court made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one party knowingly accepts the benefits of a contract or conveyance or an order, it is estopped to deny the validity or binding effect on him of such contract or conveyance or order.

The doctrine of election is a facet of law of estoppel. A party cannot blow hot and cold at the same time. Any party which takes advantage of any instrument must accept all that is mentioned in the said document. It would be apposite to refer to the treatise 'Equity-A course of lectures' by F.W. Maitland, Cambridge University, 1947, wherein the learned author succinctly described principle of election in the following terms:-

> "The doctrine of Election may be thus stated: That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it. ...''

●

308. HINDU MARRIAGE ACT, 1955 – Section 13
CRIMINAL PROCEDURE CODE, 1973 – Section 125
EVIDENCE ACT, 1872 – Sections 45, 112 and 114

(i) Applicability of DNA test in maintenance case – DNA test is not mandatory in each and every proceeding u/s 125 of Cr.P.C. Following circumstances are sufficient to prove that the child is the legitimate child of the husband –

(1) Relationship of husband and wife is in existence,
(2) During their relationship the child was born,
(3) The marriage between the parties has not been dissolved
(4) The birth of the child having taken place during the subsistence of valid marriage and the husband was having access to his wife.

(ii) Refusal by wife for DNA test – Cannot be taken into consideration in case filed u/s 125 of Cr.P.C. for drawing the presumption against her.

हिन्दू विवाह अधिनियम, 1955 – धारा 13

दण्ड प्रक्रिया संहिता, 1973 – धारा 125

साक्ष्य अधिनियम, 1872 – धाराएं 45, 112 एवं 114

(i) भरण–पोषण के मामले में डी.एन.ए. परीक्षण की प्रयोज्यता – द.प्र.सं. की धारा 125 की कार्यवाही में डी.एन.ए. परीक्षण प्रत्येक मामले में अनिवार्य नहीं है। संतान का पति की धर्मज संतान होना साबित करने के लिए निम्नलिखित परिस्थितियां पर्याप्त है –

(1) पति और पत्नी के संबंध अस्तित्व में है।
(2) इस नातेदारी के दौरान संतान का जन्म हुआ था।
(3) पक्षकारों के मध्य विवाह – विच्छेद नहीं हुआ हो।
(4) बालक का जन्म विधिमान्य विवाह के विद्यमान रहने के बीच हुआ था और पति की पत्नी तक पहुंच थी।

(ii) पत्नी द्वारा डी.एन.ए. परीक्षण से इंकारी – द.प्र.सं. की धारा 125 के अंतर्गत प्रस्तुत प्रकरण में पत्नी के विरूद्ध उपधारणा निर्मित करने के लिए विचार में नहीं ली जा सकती है।

Badri Prasad Jharia v. Vatsalya Jharia
Order dated 26.06.2020 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1431 of 2018, reported in 2020 CriLJ 3025

Relevant extracts from the order:

The position of law is different in the case of Section 13 of Hindu Marriage Act and the application filed under Section 125 of Cr.P.C. "Adultery" is a ground for "Divorce" under Section 13 of Hindu Marriage Act. For proving adultery, the DNA test will definitely be useful as per the established law discussed above. If the wife is refusing for DNA test, then her refusal may be considered as a ground for drawing adverse inference against her. But the position under Section 125 of Cr.P.C. is different. Section 125 (1)(b) of Cr.P.C. provides that the person is also liable to grant the maintenance to his illegitimate minor child.

●

309. HINDU MARRIAGE ACT, 1955 – Section 13 (1) (ia)

Divorce on the ground of cruelty – Whether filing a criminal case by one of the spouses and acquittal therein would automatically be treated as a ground of cruelty for granting divorce? Held, No – Such an interpretation will be against the statutory provision.

हिन्दू विवाह अधिनियम, 1955 – धाराएं 13 (1) (ik)

क्रूरता के आधार पर विवाह–विच्छेद – क्या पति–पत्नी में से एक के द्वारा आपराधिक प्रकरण प्रस्तुत किया जाना और उसमें दोषमुक्ति हो जाना स्वतः 'क्रूरता' के रूप में विवाह–विच्छेद के आधार के रूप में मान्य किया जाएगा? अभिनिर्धारित, नहीं – ऐसा निर्वचन संविधिक प्रावधानों के प्रतिकूल होगा।

Mangayakarasi v. M. Yuvaraj

Judgment dated 03.03.2020 passed by the Supreme Court in Civil Appeal No. 1912 of 2020, reported in AIR 2020 SC 1198 (Three-Judge Bench)

Relevant extracts from the judgment:

The tenor of the substantial questions of law as framed in the instant case and decision taken on that basis if approved, it would lead to a situation that in every case if a criminal case is filed by one of the parties to the marriage and the acquittal therein would have to be automatically treated as a ground for granting divorce which will be against the statutory provision.

However, in the present facts as already indicated, the situation is not so. Though a criminal complaint had been lodged by the wife and husband has been acquitted in the said proceedings the basis on which the husband had approached the Trial Court is not of alleging mental cruelty in that regard but with regard to her intemperate behaviour regarding which both the courts below on appreciation of the evidence had arrived at the conclusion that the same was not proved. In that background, if the judgment of the High Court is taken into consideration, we are of the opinion that the High Court was not justified in its conclusion.

●

310. HINDU MINIORITY AND GUARDIANSHIP ACT, 1956 – Sections 7 and 11

***De facto* guardian – *De facto* guardian of a Hindu cannot deal with minor's property – Merely on the ground of his or her being a *de facto* guardian of the minor, no person is entitled to dispose of or deal with the property of a Hindu minor.**

हिन्दू अप्राप्तवयता तथा संरक्षकता अधिनियम, 1956 – धाराएं 7 एवं 11

वास्तविक संरक्षक – एक अवयस्क हिंदू का वास्तविक संरक्षक अप्राप्तवय की संपत्ति का सौदा नहीं कर सकता – इस अधिनियम के लागू होने के पश्चात् कोई भी व्यक्ति किसी अप्राप्तवय की संपत्ति के निपटारे या सौदे का, केवल उसके या उसकी वास्तविक संरक्षक होने के आधार पर हकदार नहीं है।

Varun Talreja v. Muskan Talreja and anr.

Judgment dated 11.09.2019 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 422 of 2009, reported in 2020 (3) MPLJ 460 (DB)

Relevant extracts from the judgment:

It is also true that Mr. Parmanand is not a Court appointed guardian but is *de facto* guardian. Learned lower Court has rightly referred to provisions contained in Section 11 of the Hindu Minority and Guardianship Act, 1956, which provides that *de facto* guardian not to deal with minor's property. Section 11 of the Hindu Minority and Guardianship Act, 1956, provides that after the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being a *de facto* guardian of the minor.

●

311. INDIAN PENAL CODE, 1860 – Sections 34, 149 and 302

Conversion of conviction from Section 302 r/w/s 149 to one u/s 302 r/w/s 34 – When permissible? Held, existence of common intention and participation in some manner by the person sought to be held liable u/s 34 must be established – When some doubt exists as to common intention, conversion not justified.

भारतीय दण्ड संहिता, 1860 – धाराएं 34, 149 एवं 302

धारा 302 सहपठित धारा 149 के अधीन दोषसिद्धि का धारा 302 सहपठित धारा 34 के अधीन संपरिवर्तन – कब अनुज्ञेय है? अभिनिर्धारित, किसी व्यक्ति को धारा 34 के अधीन उत्तरदायी ठहराने के लिए सामान्य आशय का अस्तित्व और किसी न किसी प्रकार की सहभागिता स्थापित की जानी चाहिए – जब सामान्य आशय को लेकर कुछ संदेह हो तो संपरिवर्तन न्यायोचित नहीं है।

Chellappa v. State through The Inspector of Police
Order dated 04.05.2020 passed by the Supreme Court in Criminal Appeal No. 420 of 2011, reported in (2020) 5 SCC 160 (Three-Judge Bench)

Relevant extracts from the order:

Section 34 IPC is not a substantive offence. Before a person can be held responsible under this section, it must be established that there was a common intention and the person being sought to be held liable must have participated in some manner in the act constituting the offence. The common intention shared by the accused should be anterior in time to the commission of the offence, but may develop on the spot when the crime is committed. [see ***Virendra Singh v. State of M.P., (2010) 8 SCC 407***] However, from a perusal of the impugned High Court judgment [***Kennady v. State, Criminal Appeal (MD) No. 1 of 2006, order dated 19-12-2007 (Mad)***], as well as the submissions of the prosecution, it is clear that no reasoning or evidence has been advanced as to the fulfillment of the requirements for the conviction of the appellant-accused under Section 34 IPC in the present case.

Further, a perusal of the circumstantial evidence in the case does not clearly indicate that the appellant-accused had common intention with the main accused to kill the deceased. In fact, from the statement of PW 2, it is clear that at the time of the incident the main accused was the only person who reacted to the words of the deceased and his family members asking them to make way, and stabbed the deceased in the spur of the moment. As such, when some doubt exists as to the common intention animating the appellant-accused, the same must inure to the benefit of the appellant-accused.

Therefore, after hearing the submissions advanced by the parties and carefully perusing the material placed on record, we are of the opinion that the conviction and sentence of the appellant-accused under Section 302 IPC read with Section 34 IPC deserves to be set aside as the same is not proved beyond reasonable doubt.

●

312. INDIAN PENAL CODE, 1860 – Section 84
EVIDENCE ACT, 1872 – Section 9

(i) Test Identification Parade – Refusal to participate – Effect of – Held, refusal to participate in TIP proceedings establish the accused's guilty conscience and ought to be given substantial weight.

(ii) Plea of unsoundness of mind – When should be raised? Held, such plea ought to be raised during trial itself – In order to succeed in such plea, accused must show by preponderance of probabilities that he suffered from a serious-enough mental disorder which affects his ability to distinguish right from

wrong – Further held, it must also be established that accused was afflicted by such disability at the time of crime and *sans* for such impairment, crime would not have been committed.

भारतीय दण्ड संहिता, 1860 – धारा 84

साक्ष्य अधिनियम, 1872 – धारा 9

(i) पहचान परेड – भाग लेने से इंकार करना – प्रभाव – अभिनिर्धारित, पहचान परेड कार्यवाही में भाग लेने से इंकार करना अभियुक्त के दोषी अंतःकरण को स्थापित करता है और इस तथ्य को सारवान् महत्व दिया जाना चाहिए।

(ii) विकृतचित्ता का बचाव – कब उठाया जाना चाहिए? अभिनिर्धारित, ऐसा बचाव विचारण के दौरान ही उठाया जाना चाहिए – ऐसे अभिवाक् की सफलता के लिए, अभियुक्त को अधिसंभावनाओं की संभाव्यता के द्वारा दर्शाना होगा कि वह किसी पर्याप्त–गंभीर मानसिक विकार से पीड़ित था जो उसकी गलत व सही का भेद करने की क्षमता को प्रभावित करता है – आगे अभिनिर्धारित, यह भी साबित किया जाना चाहिए कि अपराध के समय भी अभियुक्त ऐसी निर्योग्यता के प्रभाव में था और इस प्रकार प्रभावित न होने पर अपराध घटित नहीं होता।

Mohd. Anwar v. State (NCT of Delhi)

Judgment dated 19.08.2020 passed by the Supreme Court in Criminal Appeal No. 1551 of 2010, reported in (2020) 7 SCC 391 (Three-Judge Bench)

Relevant extracts from the judgment:

The testimonies of the witnesses are indeed impeccable and corroborative of each other. The crime of robbery with hurt has been established by the testimony of PW-1 and the other evidence on record. The complainant (PW-1) had no motive to falsely implicate the appellate and/or to allow the real culprits to go scot-free. The refusal to participate in the TIP proceedings and the lack of any reasons on the spot, undoubtedly establish the appellant's guilty conscience and ought to be given substantial weight. The three-day delay in registration of FIR, as projected by the appellant, is devoid of factual basis. The original record shows that the complaint was, in fact, registered within a few hours of the incident on 18.05.2001. It was because of preliminary police enquiry that another two days passed between reporting and subsequent lodging of FIR on 20.05.2001.

x x x

Pleas of unsoundness of mind under Section 84 of IPC or mitigating circumstances like juvenility of age, ordinarily ought to be raised during trial itself. Belated claims not only prevent proper production and appreciation of evidence, but they also undermine the genuineness of the defence's case.

Mere production of photocopy of an OPD card and statement of mother on affidavit have little, if any, evidentiary value. In order to successfully claim defence of mental unsoundness under Section 84 of IPC, the accused must show by preponderance of probabilities that he/she suffered from a serious-enough mental disease or infirmity which would affect the individual's ability to distinguish right from wrong. Further, it must be established that the accused was afflicted by such disability particularly at the time of the crime and that but for such impairment, the crime would not have been committed. The reasons given by the High Court for disbelieving these defences are thus well reasoned and unimpeachable.

●

313. INDIAN PENAL CODE, 1860 – Sections 302 and 364
CRIMINAL PROCEDURE CODE, 1973 – Sections 235(2) and 354
EVIDENCE ACT, 1872 – Section 65-B

(i) Admissibility of electronic evidence – Non-examination of the officer of the mobile company cannot be said to be fatal to the case of the prosecution, more particularly, when the CDR has been got exhibited, through the deposition of the Investigating Officer and when the same was exhibited, no objection was raised on behalf of the defence.

(ii) Hostile witness – As per the settled proposition of law, even the deposition of the hostile witness to the extent it supports the case of the prosecution can be relied upon.

(iii) Hearing on question of sentence – The object of Section 235 (2) CrPC is to provide an opportunity to accused to adduce mitigating circumstances – If the accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the Trial Court to hear the parties on sentence on the same day after passing the judgment of conviction.

(iv) Mitigating circumstances – The mental condition of the accused at the time of the commission of the offence and other factors related to the mitigating circumstances are in favour of the accused to convert the death sentence to life imprisonment.

भारतीय दण्ड संहिता, 1860 – धाराएं 302 एवं 364
दण्ड प्रक्रिया संहिता, 1973 – धाराएं 235(2) एवं 354
साक्ष्य अधिनियम, 1872 – धारा 65–ख

(i) इलेक्ट्रॉनिक साक्ष्य की ग्राहता – मोबाइल कंपनी के अधिकारी का परीक्षण न कराया जाना अभियोजन के लिए घातक नहीं कहा जा सकता, वह भी तब, जबकि अन्वेषण अधिकारी की साक्ष्य के आधार पर कॉल डिटेल रिकार्ड (सी.डी.आर.) को

प्रदर्शित किया जा चुका हो और ऐसे प्रदर्शित किये जाने के समय बचाव पक्ष की ओर से कोई आपत्ति प्रस्तुत नहीं की गई हो।

(ii) पक्षद्रोही साक्षी – विधि के प्रतिपादित सिद्धांत के अनुसार पक्षद्रोही साक्षी की साक्ष्य उस सीमा तक विश्वास किया जा सकता है जो अभियोजन के मामले का समर्थन करती हो।

(iii) दण्ड के प्रश्न पर सुनवाई – द.प्र.सं. की धारा 235 (2) का उद्देश्य अभियुक्त को ऐसा अवसर उपलब्ध कराना है कि वह लघुतरकारी परिस्थितियाँ प्रस्तुत कर सके – यदि अभियुक्त दोषसिद्धि का निर्णय घोषित किये जाने के दिन ही इस संबंध में तर्क प्रस्तुत करने के लिए तैयार है तब विचारण न्यायालय उसी दिन दोषसिद्धि का निर्णय पारित करने के उपरांत पक्षकारों को दण्डादेश पर सुन सकता है।

(iv) लघुतरकारी परिस्थितियाँ – अपराध कारित किये जाने के समय अभियुक्त की मानसिक स्थिति एवं लघुतरकारी परिस्थितियों से संबंधित अन्य कारक जो अभियुक्त के पक्ष में हों मृत्यु दण्डादेश को अजीवन कारावास में परिवर्तित करते हैं।

Manoj Suryavanshi v. State of Chhattisgarh

Judgment dated 05.03.2020 passed by the Supreme Court in Criminal Appeal No. 388 of 2020, reported in (2020) 4 SCC 451 (Three-Judge Bench)

Relevant extracts from the judgment:

Phone calls made at 11.00 pm on the mobile of the accused in the night of 11.02.2011 has been established and proved by the prosecution by producing the call details from the mobile company (produced as Ex.P.30). The accused has failed to give any explanation on the same in his statement under Section 313 Cr.P.C. Non-examination of the officer of the mobile company cannot be said to be fatal to the case of the prosecution, more particularly, when the CDR has been got exhibited, through the deposition of the Investigating Officer and when the same was exhibited, no objection was raised on behalf of the defence. Even otherwise, it is required to be noted that the mobile SIM No. 9179484724 was seized from the accused at the time of his arrest and which is proved as per the seizure memo. Therefore, the prosecution has proved that the mobile SIM No. 9179484724 belonged to the accused.

One other important evidence against the accused is the deposition of P.W.13-Ashok Kumar Madhukar. The accused was found hiding in the house of said Ashok Kumar Madhukar situated at village Lakharam which is 5-6 kilometers away. It is true that the said witness has turned hostile. However, in the cross-examination by the prosecution, P.W. 13 has specifically stated that the accused Manoj told him that the children of Shivlal had gone missing and Shivlal has

lodged a report against him and the police is looking for him. He has specifically stated in the cross examination that he engaged the accused Manoj in conversation and thereafter the police came and took Manoj after arresting him. Therefore, the fact that the accused was found from the house of said Ashok Kumar Madhukar from village Lakharam has been established and proved, despite the said Ashok Kumar Madhukar has turned hostile. As per the settled proposition of law, even the deposition of the hostile witness to the extent it supports the case of the prosecution can be relied upon.

The object of Section 235 (2) of the Cr.P.C is to provide an opportunity for accused to adduce mitigating circumstances. This does not mean, however, that the Trial Court can fulfill the requirements of Section 235(2) of the Cr.P.C. only by adjourning the matter for one or two days to hear the parties on sentence. If the accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the Trial Court to hear the parties on sentence on the same day after passing the judgment of conviction. (See – '***X' v. State of Maharashtra, (2019) 7 SCC 1***)

The mental condition of the accused at the time of the commission of the offence and that the accused was under extreme mental disturbance due to his wife having eloped with the uncle of the deceased and that his children were deprived of the company of their mother, the mitigating circumstances are in favour of the accused to convert the death sentence to life imprisonment.

●

314. INDIAN PENAL CODE, 1860 – Sections 302 and 498-A
CRIMINAL PROCEDURE CODE, 1973 – Sections 273 and 317
Criminal trial – Recording of the statements of the witnesses in absence of the accused without assigning any reason – It amounts to violation of the mandatory provision contained in Section 273 CrPC.

भारतीय दण्ड संहिता, 1860 – धाराएं 302 एवं 498–क

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 273 एवं 317

आपराधिक विचारण – कारण अभिलिखित किए बिना अभियुक्त की अनुपस्थिति में साक्षी के कथन अभिलिखित करना द.प्र.सं. की धारा 273 में उपबंधित आदेशात्मक प्रावधान के उल्लंघन के समतुल्य होगा।

Gajendra Singh v. State of Madhya Pradesh

Judgment dated 05.03.2020 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Revision No. 241 of 2013, reported in 2020 CriLJ 3188 (M.P.)

Relevant extracts from the judgment:

In the case at hand, it is borne out from the record/order sheets that all the prosecution witnesses were examined in absence of the accused/appellant and on those dates no specific reasoned order had been passed by the Trial Court under which the evidence of witnesses would have been recorded in absence of the appellant. Apart from this, the pleader of the accused/appellant had not given any version or statement that he was authorized by the accused to examine the said witnesses in absence of the accused/appellant.

In the light of the law laid down in the case of ***Atma Ram & ors. v. State of Rajasthan, 2019 CrLR (SC) 633***, it has been held that no examination and cross-examination of the witnesses could have been undertaken. The Trial Court erred in recording the statements of the witnesses in absence of the appellant overlooking the mandatory provision contained in Section 273 Cr.P.C.

●

315. INDIAN PENAL CODE, 1860 – Section 307
EVIDENCE ACT, 1872 – Section 27
APPRECIATION OF EVIDENCE:

(i) Witnesses – Appreciation of – Evidence of witnesses has to be read as a whole – Words and sentences cannot be truncated and read in isolation.

(ii) Recovery of weapon from open field – When reliable? Held, where weapons were dug out from underneath the sand in open ground at the behest of accused, it cannot be said that recovery was from open place accessible to all – Inability of investigating officer to recall details as to houses, roads and streets after several years, is immaterial.

भारतीय दण्ड संहिता, 1860 – धारा 307

साक्ष्य अधिनियम, 1872 – धारा 27

साक्ष्य का मूल्यांकनः

(i) साक्षियों का मूल्यांकन – साक्षियों के कथन पूर्णता में पढ़े जाने चाहिए – शब्दों और वाक्यों को अलग कर विलगता में नहीं पढ़ा जा सकता है।

(ii) खुले मैदान से हथियार की बरामदगी – कब विश्वसनीय होगी? अभिनिर्धारित, जहां अभियुक्त की निशांदेही पर खुले मैदान में रेत के नीचे से हथियार को खोदकर निकाला गया, वहां यह नहीं कहा जा सकता कि बरामदगी ऐसे खुले स्थान से की गई जो सभी के लिए सुलभ था – अनुसंधान अधिकारी द्वारा घरों, सड़कों और गलियों का विवरण याद करने में अक्षमता सारहीन है।

Mustak alias Kanio Ahmed Shaikh v. State of Gujarat

Judgment dated 18.06.2020 passed by the Supreme Court in Criminal Appeal No. 488 of 2017, reported in (2020) 7 SCC 237

Relevant extracts from the judgment:

With the greatest of respect, the evidence of the witnesses have to be read as a whole. Words and sentences cannot be truncated and read in isolation. The witness has categorically stated that he would be able to identify and actually identified the driver of the motor cycle as the Appellant. The PW-11 being the Judicial Magistrate has corroborated identification of the Appellant by the complainant in the Test Identification Parade.

x x x

Ms. Arora argued that the Prosecution could not have relied on recovery of a weapon from an open field after one month from the date of the alleged incident. PW-14, Investigating Officer, could not stand the test of cross-examination with regard the description of the place of alleged recovery and the direction thereto. To buttress her arguments, Ms. Arora referred to the cross-examination of the PW-14 where he stated:-

> "It is not true that the place from where the accused found the weapon is situated too far and deep from the main road. I do not recall now that after getting down from the Jeep and to reach to the place, it comes after three curves, or not, I do not recall now. It is true that too many residential houses comes on the way, I cannot say that what is situated in front of row of those residential houses. It is true that the place from where the weapon was found out was open space, there was no traffic. I have not recorded statement of anyone form the residential houses situated nearby the said place."

In my considered opinion, minor discrepancies in evidence and inability to recall details of the description of houses, roads and streets after several years, do not vitiate the evidence of recovery itself. The Appellant showed the police the spot where the weapons had been hidden under the sand.

From the evidence and materials on record it cannot be said that recovery of the weapon of offence was from an open place accessible to all. The weapons were dug out from underneath the sand in an open ground behind the Shah Alam Dargah.

●

***316. INTERPRETATION OF STATUTES:**

Interpretation of statutes – Two conflicting provisions of same statute – Principles of interpretation – Held, if two conflicting views are possible and they cannot be reconciled, court must adopt the interpretation that furthers the intention of the legislature – ***Verba ita sunt intelligenda ut res magis valeat quam pereat*** **followed.**

संविधियों का निर्वचनः

संविधियों का निर्वचन – एक ही विधि के दो विरोधाभासी प्रावधान – निर्वचन के सिद्धांत – अभिनिर्धारित, यदि दो विरोधाभासी मत संभव हों, और जिनका सामंजस्य न हो सकता हो, वहां न्यायालय को ऐसा निर्वचन करना चाहिए जो विधायिका के उद्देश्य को अग्रसर करे – *शब्दों का ऐसा अर्थ करना चाहिये कि उससे विलेख प्रभावशील हो न कि निरर्थक हो जाए,* अनुसरित।

Managing Director, Chhattisgarh State Co-operative Bank Maryadit v. Zila Sahkari Kendriya Bank Maryadit and ors.
Judgment dated 04.03.2020 passed by the Supreme Court in Civil Appeal No. 1961 of 2020, reported in (2020) 6 SCC 411

●

317. LAND REVENUE CODE, 1959 (M.P.) – Section 158 (1) (d) (i)
REWA STATE LAND REVENUE AND TENANCY CODE, 1935 – Section 44
VINDHYA PRADESH ABOLITION OF JAGIRS AND LAND REFORMS ACT, 1952 – Sections 26 and 28
EVIDENCE ACT, 1872 – Section 58
CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27

(i) Bhumiswami Right – *Pawaidar*, u/s 44 of the Code of 1935 was empowered to issue lease and lease holder became direct tenant of the State in place of Jagirdar u/s 26 of the Act of 1952 and u/s 28 of the Act they became a *Pattedar-Tenant* – A *Pattedar* Tenant in Vindhya Pradesh in possession of the lands became Bhumiswami u/s 158 (1) (d) (i) of the M.P. Land Revenue Code.

(ii) Admission – Section 58 of the Evidence Act postulates that the things admitted need not be proved – Proviso to Section 58 of the Evidence Act gives full discretion to court to require the fact admitted to be proved otherwise than by such admission.

(iii) Additional document – Production of additional evidence – Explained – An application for production of additional evidence cannot be allowed if appellant was not diligent in producing the relevant documents in lower court – However, in the interest of justice and when satisfactory reasons are given, court can entertain additional documents.

भू–राजस्व संहिता, 1959 (म.प्र.) – धारा 158 (1) (घ) (एक)

रीवा राज्य भू–राजस्व तथा काश्तकारी संहिता, 1935 – धारा 44

विंध्य प्रदेश जागीर उन्मूलन एवं भूमि सुधार अधिनियम, 1952 – धाराएं 26 एवं 28

साक्ष्य अधिनियम, 1872 – धारा 58

सिविल प्रक्रिया संहिता, 1908 – आदेश 41 नियम 27

(i) भूमिस्वामी अधिकार – 1935 की संहिता की धारा–44 के प्रावधान के अंतर्गत *पवाईदार* पट्टा जारी करने हेतु सशक्त था और 1952 के अधिनियम की धारा 26 के अंतर्गत पट्टाधारक जागीरदार के स्थान पर सीधे राज्य के किराएदार बन गए एवं अधिनियम की धारा 28 के अंतर्गत वे एक पट्टेदार–किराएदार हो गये। मध्यप्रदेश भू–राजस्व संहिता की धारा 158 (1) (घ) (i) के अंतर्गत विंध्यप्रदेश का एक पट्टेदार–किरायेदार जिसके पास भूमि का कब्जा था, भूमिस्वामी बन गया।

(ii) स्वीकृति – साक्ष्य अधिनियम की धारा 58 अधिनियमित करती है कि स्वीकृत तथ्यों को साबित करने की आवश्यकता नहीं है – हालांकि साक्ष्य अधिनियम की धारा 58 का परंतुक न्यायालय को स्वीकृत तथ्यों को ऐसी स्वीकृति के अन्यथा अन्य साक्ष्य से साबित करवाए जाने का पूर्ण विवेकाधिकार देता है।

(iii) अतिरिक्त दस्तावेज – अतिरिक्त साक्ष्य प्रस्तुत किया जाना – व्याख्या की गई – अतिरिक्त साक्ष्य प्रस्तुत करने हेतु आवेदन अनुमत नहीं किया जा सकता यदि अपीलार्थी अधीनस्थ न्यायालय में संबंधित दस्तावेज प्रस्तुत करने में तत्पर नहीं था – हालांकि न्यायहित में और जब संतोषजनक कारण दिये जाएं तब न्यायालय अतिरिक्त दस्तावेजों को ग्रहण कर सकता है।

Jagdish Prasad Patel (Dead) through L.Rs. & anr. v. Shivnath & ors.

Judgment dated 09.04.2019 passed by the Supreme Court in Civil Appeal No. 2176 of 2007, reported in ILR (2020) MP 43 (SC)

Relevant extracts from the judgment:

In 1948, the State of Rewa acceded to India and became part of the State of Vindhya Pradesh. In 1952, the State of Vindhya Pradesh abolished the system of *Jagirdari* by the Vindhya Pradesh Abolition of Jagirs and Land Reforms Act, 1952. Under Section 26 of the Vindhya Pradesh Act, the appellants' father Hanuman Din became direct tenant of the State in place of *Jagirdar* and under Section 28 of the Act, he became a *pattedar-tenant.*

By the States Reorganization Act, 1956, the erstwhile State of Vindhya Pradesh became a part of larger Madhya Pradesh. Subsequent to which, the State of Madhya Pradesh enacted the M.P. Land Revenue Code, 1959 (M.P. Code) whereby the appellants' predecessor Hanuman Din being a *pattedar-tenant* in Vindhya Pradesh in possession of the lands, became their Bhumiswami under Section 158(1)(d)(i) of the M.P. Code. After following the due procedure laid down under Sections 109 and 110 of the M.P. Code, his name was entered in revenue records.

The trial court rightly held that the disputed lands belonged to the *illaqa* and the *Pawaidar* was empowered under the provisions of Section 44 of the Rewa Act to issue the said lease.

Section 58 of the Evidence Act, no doubt, postulates that the things admitted need not be proved. However, proviso to Section 58 of the Evidence Act gives full discretion to the court to require the facts admitted to be proved otherwise than by such admission. When the respondents-plaintiffs have filed the suit for declaration of their title, the respondents-plaintiffs cannot isolate few sentences in the written statement and take advantage of only those parts of the written statement which are favourable to them. The written statement filed by the appellants-defendants has to be read in toto. It is pertinent to note that in para No.(2) of the written statement, the appellants-defendants averred that the lands were in the ownership of Ram Raj Singh at the time of the settlement, but because he was not in a position to cultivate the same himself, the lands were given to the father of the respondents-plaintiffs for cultivation on the basis of *Batai* crop sharing. It is further averred that the then *Halkedar* cancelled the lease in respect of disputed lands and the same were auctioned in which the bid of the defendants' father Gaya Din was accepted and the disputed lands were transferred in his name in the sale in *Samvat* 1986 i.e. 1929 A.D. The lease of the lands was issued in the name of Gaya Din. The admission of the defendants as to the lease of the plaintiffs' father was the lease earlier granted in favour of the forefathers of the respondents. In the light of the pleadings and the oral and documentary evidence adduced by the defendants, notwithstanding the admission in the written statement, the burden lies upon the respondents-plaintiffs to prove that the *patta-lease* continues to be in their favour and that they are the holders of *patta* and that they are in continued possession of the suit properties.

Under Order XLI Rule 27 CPC, production of additional evidence, whether oral or documentary, is permitted only under three circumstances which are: (i) Where the trial Court had refused to admit the evidence though it ought to have been admitted; (ii) the evidence was not available to the party despite exercise of due diligence; and (iii) the appellate Court required the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature. An application for production of additional evidence cannot be allowed if the appellant was not diligent in producing the relevant documents in the lower court. However, in the interest of justice and when satisfactory reasons are given, court can receive additional documents.

●

318. LIMITATION ACT, 1963 – Section 5

CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 90

Condonation of delay – Limitation – Filing of application to set aside a sale in execution of decree – Can be filed within 60 days under Article 127 of Limitation Act – Delay in filing of proceedings under Order 21 Rule 90 of CPC cannot be condoned u/s 5 of the Limitation Act nor time can be extended.

परिसीमा अधिनियम, 1963 – धारा 5

सिविल प्रक्रिया संहिता, 1908 – आदेश 21 नियम 90

विलंब हेतु क्षमा – परिसीमा अधिनियम के अनुच्छेद 127 के अनुसार डिक्री के निष्पादन में किये गये एक विक्रय को अपास्त करने हेतु आवेदन प्रस्तुत करने की परिसीमा 60 दिवस है – सि.प्र.सं. के आदेश 21 नियम 90 के अंतर्गत प्रस्तुत प्रकरण में किया गया विलंब परिसीमा अधिनियम की धारा 5 के अंतर्गत क्षमा नहीं किया जा सकता है और न ही समय विस्तारित किया जा सकता है।

Aarifaben Yunusbhai Patel and ors.v. Mukul Thakorebhai Amin and ors.

Judgment dated 17.03.2020 passed by the Supreme Court in Civil Appeal No. 1643 of 2020 reported in AIR 2020 SC 2344

Relevant extracts from the judgment:

The limitation for filing an application to set aside a sale in execution of decree is 60 days in terms of Article 127 of Third Division, Part -1 of the Limitation Act, 1963 (for short the Act). Reference may also be made to Section 5 of the Act which reads as follows:-

> "**5. Extension of prescribed period in certain cases**.— Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.
>
> ***Explanation***.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

'A bare reading of this provision clearly shows that Section 5 of the Act which deals with extension of time or condonation of delay is not applicable to proceedings under Order XXI Rule 90 of the CPC. Therefore, the delay, if any, cannot be condoned under Section 5 of the Act.'

●

319. MOTOR VEHICLES ACT, 1988 – Sections 163-A and 166

(i) Assessment of compensation – Death of housewife – Notional income is ₹ 5,000/- per month – Future prospects; entitlement of – Held, skills of a matured and skilled housewife towards contribution of welfare of family and in upbringing of children would enhance by time – Dependents are entitled to future prospects @ 40%.

(ii) Assessment of compensation – Death of school going child – Future prospects; entitlement of – Held, due to uncertainties of young life, future prospects cannot be ascertained. [*New India Assurance Co. Ltd. v. Satender, (2006) 13 SCC 60* followed]

मोटरयान अधिनियम, 1988 – धाराएं 163–क एवं 166

(i) प्रतिकर का निर्धारण – गृहिणी की मृत्यु – काल्पनिक आय ₹ 5,000/– प्रतिमाह – भविष्यवर्ती लाभ की पात्रता – अभिनिर्धारित, परिपक्व और कुशल गृहिणी का परिवार के कल्याण और बच्चों की परवरिश में योगदान देने संबंधी कौशल समय के साथ बढ़ता है – उसके आश्रित 40 प्रतिशत की दर से भविष्यवर्ती लाभ के पात्र हैं।

(ii) प्रतिकर का निर्धारण – स्कूल जाने वाले बच्चे की मृत्यु – भविष्यवर्ती लाभ की पात्रता – अभिनिर्धारित, युवा जीवन की अनिश्चितताओं के कारण, भविष्यवर्ती लाभ का आंकलन नहीं किया जा सकता है। [*न्यू इंडिया एश्योरेंस कंपनी लिमिटेड वि. सतेन्दर, (2006) 13 एससीसी 60* अनुसरित]

Rajendra Singh and ors. v. National Insurance Co. Ltd. and ors.
Judgment dated 18.06.2020 passed by the Supreme Court in Civil Appeal No. 2624 of 2020, reported in (2020) 7 SCC 256

Relevant extracts from the judgment:

The first deceased was a housewife aged about 30 years. In ***Lata Wadhwa v. State of Bihar, (2001) 8 SCC 197***, this court had observed that considering the multifarious services rendered by housewives, even on a modest estimation, the income of a housewife between the age group of 34 to 59 years who were active in life should be assessed at Rs 36,000 per annum. A distinction was also drawn with regard to elderly ladies in the age group of 62 to 72 who would be more adept in discharge of housewife duties by age and experience, and the value of services rendered by them has been taken at Rs 20,000 per annum.

In ***Arun Kumar Agrawal v. National Insurance Co. Ltd., (2010) 9 SCC 218***, the Tribunal assessed the notional income of the housewife at Rs.5,000 per month, but without any rational or reasoning concluded that she was a non-earning member and reduced the same to Rs.2,500, which was affirmed by the

High Court. Disapproving the same and restoring the assessed income, this Court observed at Paragraphs 26 and 27 as follows:

> "In India the courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.
>
> It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. the husband and children. However, for the purpose of award of compensation to the dependants, some pecuniary estimate has to be made of the services of the housewife/ mother. In that context, the term "services" is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier."

The notional income of the first deceased is therefore held to be Rs.5000 per month at the time of death. The compensation on that basis with a deduction of 1/4th i.e. Rs.15,000/ towards personal expenses with a multiplier of 17 is assessed at Rs.7,65,000. If the deceased had survived, in view of observations

in ***Lata Wadhwa*** (supra), her skills as a matured and skilled housewife in contributing to the welfare and care of the family and in the upbringing of the children would have only been enhanced by time and for which reason we hold that the appellants shall be entitled to future prospects at the rate of 40% in addition to the loss of consortium and future expenses already granted.

x x x

In ***New India Assurance Co. Ltd. v. Satender, (2006) 13 SCC 60***, the deceased victim of the accident was a nine year old school going child. Considering the claim for loss of future prospects in absence of a regular income, it was observed that the compensation so determined had to be just and proper by a judicious approach and not fixed arbitrarily or whimsically. The uncertainties of a young life were noticed in the following terms:—

> "In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation."

●

320. MOTOR VEHICLES ACT, 1988 – Section 166

Claim application; Rejection of – If claimant fails to prove that proximate cause of death was road accident and there was *nexus* between injuries and death, rejection of claim application by Tribunal is justified.

मोटरयान अधिनियम, 1988 – धारा 166

दावा आवेदन का नामंजूर किया जाना – जब दावेदार यह साबित करने में असफल रहता है कि मृत्यु का आसन्न कारण सड़क दुर्घटना थी तथा चोटों और मृत्यु के बीच संबंध था, तब अधिकरण द्वारा दावा आवेदन को निरस्त किया जाना न्यायोचित है।

Bachan Singh and ors. v. Rajveer Singh Yadav and ors.

Judgment dated 21.06.2019 passed by the High Court of M.P. (Gwalior Bench) in M.A. No. 701 of 2017, reported in 2020 ACJ 1836

Relevant extracts from the Judgment:

The learned counsel for the insurance company submits that there is no error in the impugned award. After discharge from J.A. Hospital on 13.10.2012, there are no treatment papers to show that deceased was under treatment during the intervening period. It is also submitted that Exh. P1 reveals that Vimla Devi was admitted in Konark Hosptial on 20.10.2012 at about 10.00 p.m. and was discharged as the patient had left the hospital with intention to move to the other hospital without giving any consent on 21.10.2012 at 7 a.m. As per death certificate of Vimla Devi, her place of death has been shown as Banmore, District Morena as is evident from Exh. P-26-C and also there is a document on record to show that Vimla Devi was suffering from tuberculosis, as is apparent from Exh. P13, wherein it has come on record that on 13.10.2012, she was suspected of pulmonary tuberculosis. Therefore, the case-laws submitted by learned counsel for the appellants being distinguishable will be of no help to the appellants.

After hearing the arguments of learned counsel for the parties and going through the record, I am of the opinion that as far as law laid down in the case of ***Ramathal v. Managing Director, Cheran Transport Corporation, (2003) 10 SCC 53*** is concerned, in that case doctor was examined who had categorically stated that accident might have been the cause of death and there was no evidence on record to show absence of link between the accident and death. Therefore, this judgment is distinguishable from the facts of the present case inasmuch as claimants did not examine any doctor in their favour to show that proximate cause of death was accident.

Similarly, in the case of ***Maha Devi v. P.N.C. Construction Co. Ltd., MACD 2008 (2) (MP) 642*** occurrence of death due to accident was proved by other relevant and reliable evidence and, therefore, it has been held that if post-mortem is not proved, compensation can be granted, but in the present case not only doctor has not been examined but also there is no post-mortem or any document showing treatment during the intervening period after discharge from one hospital to another and, therefore, ratio of ***Maha Devi*** (supra) will also not be applicable. In the case of ***Sheela Bai v. Durgpal, M.A. No. 138 of 2004 decided on 18.03.2008***, the court recorded the opinion that there was evidence on record to show that death had taken place due to injuries sustained in the accident which occurred on 23.04.2002 and deceased remained an indoor patient in J.A. Hospital, Gwalior up to 20.05.2002, when she was discharged from the hospital against her wishes. In present case, deceased Vimla Devi was taken by her relative from Konark Hospital without giving any consent for such movement and there is no iota of evidence to connect death of Vimla Devi with accident. Therefore, the fact remains that impugned award has been passed after due and proper consideration of evidence in the matter and does not call

for any interference. There is no examination of doctor and no evidence to show that cause of death was accident and moreover factum of tuberculosis and its impact has not been explained by the claimants, therefore, this court is of the opinion that judgments referred to by the appellants are distinguishable and are not applicable to the facts and circumstances of the present case and onus was on the appellants to prove that proximate cause of death was accident; therefore, appeal fails and is dismissed.

●

***321. MOTOR VEHICLES ACT, 1988 – Sections 166 and 173**

Compensation – Computation of income – Consideration of latest Income Tax Returns – Held, latest ITR filed by the deceased must be taken into consideration while assessing the income of deceased.

मोटरयान अधिनियम, 1988 – धाराएं 166 एवं 173

प्रतिकर – आय की गणना – नवीनतम आयकर विवरणी पर विचार – अभिनिर्धारित, मृतक द्वारा दायर नवीनतम आयकर विवरणी को मृतक की आय का आंकलन करते समय विचार में लिया जाना चाहिए।

Sangita Arya and ors v. Oriental Insurance Company Ltd. and ors.
Judgment dated 16.06.2020 passed by the Supreme Court in Civil Appeal No. 2612 of 2020, reported in (2020) 5 SCC 327 (Three – Judge Bench)

●

322. N.D.P.S. ACT, 1985 – Sections 18 and 50

(i) Search and seizure – Compliance of Section 50 when not required? Held, where recovery is not made from personal search, compliance of Section 50 is not required – In such cases, whether search was conducted before gazetted officer or not becomes immaterial.

(ii) Production of entire contraband before court – When not necessary? Sample alongwith the bag from which contraband was recovered were produced during trial – There was no argument of tampering with the seal – Held, if the seizure is otherwise proved on record, entire contraband need not be produced before the court.

स्वापक औषधि एवं मनःप्रभावी पदार्थ अधिनियम, 1985 – धाराएं 18 एवं 50

(i) तलाशी एवं जप्ती – धारा 50 का अनुपालन कब आवश्यक नहीं? अभिनिर्धारित, जहां बरामदगी व्यक्तिगत तलाशी से नहीं की जाती हो, वहां धारा 50 का

अनुपालन आवश्यक नहीं है – ऐसे मामलों में राजपत्रित अधिकारी के समक्ष तलाशी ली गई थी अथवा नहीं, महत्वहीन हो जाता है।

(ii) न्यायालय के समक्ष संपूर्ण निषिद्ध पदार्थ की प्रस्तुति – कब आवश्यक नहीं? विचारण के दौरान नमूना एवं थैला जिससे निषिद्ध पदार्थ बरामद की गई थी, प्रस्तुत किए गए थे – सील के साथ छेड़छाड़ का कोई तर्क नहीं था – अभिनिर्धारित, यदि जप्ती अन्यथा अभिलेख से साबित होती हो, तो संपूर्ण निषिद्ध पदार्थ की न्यायालय में प्रस्तुति आवश्यक नहीं है।

Than Kunwar v. State of Haryana

Judgment dated 02.03.2020 passed by the Supreme Court in Criminal Appeal No. 2172 of 2011, reported in (2020) 5 SCC 260

Relevant extracts from the judgment:

As regards the contention of violation of Section 50 it is based on there being personal search of the accused. PW 6, the ASI has, *inter alia*, stated as follows:

> "Personal search of accused was taken by the lady constable under the shadow of the jeep. I do not remember … I do not remember the direction of the jeep under which the personal search of the accused was taken. The lady constable has alone taken away the accused for personal search … I do not remember whether at the time of personal search driver of the jeep was in the jeep or not."

Having regard to the judgment by the three-Judge Bench, which directly dealt with this issue viz. the correctness of the view in ***Dilip v. State of M.P., (2007) 1 SCC 450***, reliance placed by the appellant on para 16 may not be available. As already noticed, we are not oblivious of the observation which has been made in the other three-Judge Bench judgment of this Court in ***Raju v. State of W.B., (2018) 9 SCC 708***, which it appears, was not brought to the notice to the Bench which decided the case later in ***State of Punjab v. Baljinder Singh, (2019) 10 SCC 473***. We notice however that the later decision draws inspiration from the Constitution Bench decision in ***State of Punjab v. Baldev Singh, (1999) 6 SCC 172.*** We also notice that this is not a case where anything was recovered on the alleged personal search. The recovery was effected from the bag for which it is settled law that compliance with Section 50 of the Act is not required.

In the circumstances, as noted above, though there appears to be doubt created about whether the DSP was present, upon being called by PW 7 having regard to the testimony of the DSP in the other case, in view of the fact that the contraband articles were in fact recovered upon search of the bag, and bearing in mind the view taken by this Court in ***Baljinder Singh*** (supra), we do not find merit in the argument of the appellant.

x x x

The Court also went to hold in ***State of Rajasthan v. Sahi Ram, (2019) 10 SCC 649*** that if seizure is otherwise proved on record and it is not even doubted or disputed, it need not be placed before the Court. The Court further held that if the seizure is otherwise proved what is required to be proved is the fact that samples taken out of a contraband are kept intact.

In the facts of this case, no doubt the contraband article weighed 6 kg 300 gm. A perusal of the judgment of the trial court does not appear to suggest that the appellant had taken the contention regarding non-production of the contraband before the trial court. This contention as such is not seen as taken before the High Court. This is a case where the sample was produced. There is no argument relating to the tampering with the seal. We further notice that in the deposition of the investigating officer (PW 7), he has stated as follows:

> "The case property is Ext. P-1, sample is Ext. P-2, sample seal is Ext. P-3 and the bag in which the case property was recovered from the possession of the accused present in the court is Ext. P-4."

●

323. N.D.P.S. ACT, 1985 – Section 21 (as amended by Amendment Act 9 of 2001)

Determination of quantity – In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the "small or commercial quantity" of the Narcotic Drugs or Psychotropic Substances – Law explained. (*E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau, AIR 2008 SC 1720* case overruled)

स्वापक औषधि एवं मनःप्रभावी पदार्थ अधिनियम, 1985 – धारा 21 (2001 के 9वें संशोधन अधिनियम द्वारा यथा संशोधित)

मात्रा का निर्धारण – एक या अधिक उदासीन पदार्थ के साथ अभिगृहीत स्वापक औषधि या मनःप्रभावी पदार्थ के मिश्रण में से उदासीन पदार्थ की मात्रा को अपवर्जित नहीं किया जा सकता और उसे प्रश्नगत औषधि की मात्रा के साथ विचार में लिया जावेगा जबकि स्वापक औषधि अथवा मनःप्रभावी पदार्थ की अल्प अथवा वाणिज्यिक मात्रा का निर्धारण किया जाना हो – विधि समझाई गई। (*ई. माइकल राज विरुद्ध इंटेलीजेंस ऑफीसर, नारकोटिक कंट्रोल ब्यूरो, एआईआर 2008 एससी 1720*)

Hira Singh and anr. v. Union of India and anr.

Judgment dated 22.04.2020 passed by the Supreme Court in Criminal Appeal No. 722 of 2017, reported in AIR 2020 SC 3255 (Three-Judge Bench)

Relevant extracts from the judgment:

In view of the above and for the reasons stated above, Reference is answered as under:

(i) The decision of this Court in the case of ***E. Micheal Raj*** (Supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

(ii) In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration alongwith actual content by weight of the offending drug, while determining the small or commercial quantity of the Narcotic Drugs or Psychotropic Substances;

(iii) Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No. S.O. 2942 (E) dated 18.11.2009 and Notification S.O. 1055 (E) dated 19.10.2001;

(iv) Challenge to Notification dated 18.11.2009 adding "Note 4" to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed.

●

324. N.D.P.S. ACT, 1985 – Section 57
EVIDENCE ACT, 1872 – Section 3

(i) Section 57 of N.D.P.S. Act – Not to be interpreted that if report is not sent within two days, the entire proceeding shall be vitiated – Provision is directory.

(ii) Seizure memo – Mere fact that one seal on seizure memo was illegible, does not vitiate the entire proceeding.

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985 – धारा 57
साक्ष्य अधिनियम, 1872 – धारा 3

(i) एन.डी.पी.एस. अधिनियम की धारा 57 की व्याख्या इस अर्थ में नहीं की जानी चाहिए कि दो दिनों के भीतर वांछित प्रतिवेदन नहीं प्रेषित किए जाने पर सम्पूर्ण कार्यवाही दूषित हो जाएगी – प्रावधान निर्देशात्मक है।

(ii) जप्ती पंचनामा – मात्र यह तथ्य कि जप्ती पंचनामे पर लगी हुई सीलों में से एक सील अस्पष्ट/अपठनीय थी, सम्पूर्ण कार्यवाही को दूषित नहीं करता।

Gurmail Chand v. State of Punjab

Judgment dated 23.01.2020 passed by the Supreme Court in Criminal Appeal No. 149 of 2020 reported in AIR 2020 SC 2161

Relevant extracts from the judgment:

In so for as section 57 of N.D.P.S. Act is concerned, it has been held that the said provision is not to be interpreted to mean that in event the report is not sent within two days, the entire proceeding shall be vitiated. The provision has been held to be directory and to be complied with but mere not sending the report within the said period cannot have such consequence as to vitiate the entire proceeding.

The mere fact that one seal was illegible does not vitiate the proceeding.

●

325. PARTNERSHIP ACT, 1932 – Sections 37 and 48

Partnership firm – There is a clear distinction between "retirement of a partner" and "dissolution of a partnership firm"– On retirement of the partner, the reconstituted firm continues and the retiring partner is to be paid his dues in terms of Section 37 of the Partnership Act – In case of dissolution, account has to be settled and distributed as per the mode prescribed in section 48 of the Partnership Act – A partnership firm must have atleast two partners – When there are only two partners and one has agreed to retire, then the retirement amounts to dissolution of the firm.

भागीदारी अधिनियम, 1932 – धाराएं 37 एवं 48

भागीदारी फर्म – ''भागीदार के पदनिवृत्त होने'' और ''एक भागीदारी फर्म के विघटन'' के बीच विभेद – समझाया गया – भागीदार के पदनिवृत्त होने पर पुर्नगठित फर्म जारी रहती है और पदनिवृत्त भागीदार को भागीदारी अधिनियम की धारा 37 की शर्तों के अनुसार उसके देयकों का भुगतान किया जाना चाहिए – विघटन के मामले में खाते भागीदारी अधिनियम की धारा 48 में प्रावधानित तरीकों से निर्धारित और वितरित किये जाने चाहिए – एक भागीदारी फर्म में कम से कम दो भागीदार अवश्य होने चाहिए – जब केवल दो भागीदार हों और एक पदनिवृत्ति हेतु सहमत है तब ऐसी पदनिवृत्ति का परिणाम फर्म का विघटन होता है।

Guru Nanak Industries, Faridabad and anr. v. Amar Singh (Dead) through LRs.

Judgment dated 26.05.2020 passed by the Supreme Court in Civil Appeal No. 6659 of 2010, reported in AIR 2020 SC 2484 (Three-Judge Bench)

Relevant extracts from the judgment:

There is a clear distinction between 'retirement of a partner' and 'dissolution of a partnership firm'. On retirement of the partner, the reconstituted firm continues and the retiring partner is to be paid his dues in terms of Section 37 of the Partnership Act. In case of dissolution, accounts have to be settled and distributed as per the mode prescribed in Section 48 of the Partnership Act. When the partners agree to dissolve a partnership, it is a case of dissolution and not retirement (See – ***Pamuru Vishnu Vinodh Reddy v. Chillakuru Chandrasekhara Reddy and ors., AIR 2003 SC 1614***). In the present case, there being only two partners, the partnership firm could not have continued to carry on business as the firm. A partnership firm must have at least two partners. When there are only two partners and one has agreed to retire, then the retirement amounts to dissolution of the firm.

●

326. SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Sections 13, 14 and 31

Exercise of power – District Magistrate cannot exercise the power conferred u/s 14 of the SARFAESI Act, 2002 for taking possession of any agricultural land as the provisions of the Act are not applicable in respect of any security interest created in agricultural land.

वित्तीय आस्तियों का प्रतिभूतिकरण एवं पुनर्गठन और प्रतिभूति हित प्रवर्तन अधिनियम, 2002 – धाराएं 13, 14 एवं 31

प्राधिकार का प्रयोग – सरफेसी अधिनियम, 2002 के प्रावधान कृषि भूमि पर सृजित किसी सुरक्षा हित पर लागू नहीं होते हैं, इसलिये जिला मजिस्ट्रेट सरफेसी अधिनियम, 2002 की धारा 14 में प्रदत्त शक्तियों का उपयोग किसी कृषि भूमि पर कब्जा प्राप्त करने के लिये नहीं कर सकता।

Anil Karma and anr. v. State of M.P. and ors.

Judgment dated 11.09.2019 passed by the High Court of M.P. (Indore Bench) in W.P. No. 1463 of 2019, reported in 2020 (3) MPLJ 634 (DB)

Relevant extracts from the judgment:

It is true that there is a remedy available to the petitioners to approach the Debt Recovery Tribunal but the order passed by the District Magistrate is *void ab initio* in the light of Section 31(i) of SARFAESI Act, 2002 which categorically provides that the provisions of Act of 2002 are not applicable in respect of any security interest created in agricultural land and therefore, once the Act of 2002 was not applicable in respect of the agricultural land, the order passed by the District Magistrate is a nullity and there appears to be no justification in forcing the petitioners to file an appeal.

The Apex Court has dealt with Section 31(i) of the SARFAESI Act, 2002 and in the light of the aforesaid judgment this Court is of the opinion that the impugned order passed by the learned District Magistrate deserves to be set aside and is accordingly set aside. However, it is made clear that the respondent no.2-Bank shall be free to take recourse to other remedies available under the law for realization of debts.

●

327. SPECIFIC RELIEF ACT, 1963 – Section 20

Specific performance – Unless stipulations and terms of contract are certain and parties must have been *consensus ad idem*, specific performance cannot be ordered.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धारा 20

विर्निदिष्ट अनुपालन – जब तक संविदा की शर्तें एवं पद निश्चित न हों एवं पक्षकारों के मध्य सहमति न हो, विर्निदिष्ट अनुपालन हेतु आदेश पारित नहीं किया जा सकता।

Satish Kumar Khandelwal v. Rajendra Jain and ors.

Judgment dated 16.03.2020 passed by the High Court of Madhya Pradesh (Indore Bench) in First Appeal No. 647 of 2008, reported in 2020 (3) MPLJ 173

Relevant extracts from the judgment:

The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, Courts direct the party in default to do the very thing which he contracted to do. Therefore, unless; the stipulations and terms of the contract are certain and parties must have been *consensus ad idem*, the specific performance cannot be ordered. The burden that the stipulations and terms of contract and the minds of parties *ad idem* is always on the plaintiff. If such burden is not discharged, stipulations/terms are uncertain, and the parties are not *ad idem*, there can be no specific performance, for there was no contract at all.

●

328. SPECIFIC RELIEF ACT, 1963 – Sections 34, 38 and 39
EVIDENCE ACT, 1872 – Sections 101 and 102
CIVIL PRACTICE:

(i) Suit for injunction simpliciter – For restraining Govt. Authorities from acting in a particular manner in compliance of orders passed/decisions taken by competent authority – Whether maintainable without challenging such orders/decisions? Held, No – A party aggrieved by an order/decision cannot decide that it is not binding upon it – Has to approach court for seeking such declaration – Such a suit for injunction simpliciter ought to be rejected on that count alone.

(ii) Civil practice – Burden of proof – Initial burden is on the plaintiffs to substantiate their cause – Weakness in defence cannot be the basis to grant relief to the plaintiffs and to shift the burden on defendants.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धाराएं 34, 38 एवं 39

साक्ष्य अधिनियम, 1872 – धाराएं 101 एवं 102

सिविल प्रथाः

(i) मात्र व्यादेश के लिए वाद – शासन के प्राधिकारियों को सक्षम प्राधिकारी द्वारा पारित आदेशों/लिए गए निर्णयों के अनुपालन में विशेष तरीके से कार्य करने से निषेधित किए जाने हेतु – क्या ऐसे आदेशों/निर्णयों को चुनौती दिए बिना पोषणीय है? अभिनिर्धारित, नहीं – किसी आदेश/निर्णय से व्यथित पक्ष स्वयं यह तय नहीं कर सकता कि यह उस पर बाध्यकारी नहीं है – उसे तत्संबंधी घोषणा के लिए न्यायालय का दरवाजा खटखटाना होगा – मात्र व्यादेश संबंधी ऐसा वाद इसी आधार पर खारिज कर दिया जाना चाहिए।

(ii) सिविल प्रथा – सबूत का भार – अपने दावे को प्रमाणित करने का प्रारंभिक भार वादी पर है – बचाव में कमी वादीगण को अनुतोष देने और सबूत का भार प्रतिवादीगण पर अंतरित करने का आधार नहीं हो सकती है।

Ratnagiri Nagar Parishad v. Gangaram Narayan Ambekar and ors.

Judgment dated 06.05.2020 passed by the Supreme Court in Civil Appeal No. 2412 of 2020, reported in (2020) 7 SCC 275

Relevant extracts from the judgment:

Arguendo, the plaint as filed by the respondent Nos. 1 to 19 also suffers from another fundamental deficiency. Indeed, it is a cleverly drafted plaint, so as to give an impression that the competent authority had not taken any decision in exercise of statutory powers until the filing of the suit. However, in the written

statement, clear assertion has been made by the defendants (appellant and respondent No. 20) that the decision to allot suit land to the appellant and for setting up the Project was taken after due deliberation and consultation with the expert Committee including in exercise of statutory powers of the concerned authority in that regard. None of these decisions of the competent authority has been assailed by the plaintiffs nor any declaratory relief sought in that regard. In such a case, it would not be enough to ask for permanent injunction simpliciter and the suit so filed ought to have been rejected at the threshold on that count alone. We may usefully advert to the exposition of this Court in ***Kandla Port v. Hargovind Jasraj, (2013) 3 SCC 182***

> "The above case was approved by this Court in ***Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group, (2011) 3 SCC 363***, wherein this Court observed:
>
> > "Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/ notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person."

Applying the principle underlying these dicta, as no declaration has been sought by the plaintiffs in the present case, the suit for simpliciter permanent injunction could not be proceeded further at all.

x x x

Be that as it may, on a fair reading of the judgment of the trial Court, it is manifest that the trial Court had opined that the plaintiffs failed to substantiate the case set out in the plaint regarding the actionable nuisance. The trial Court justly analysed the evidence of the plaintiffs in the first place to answer the controversy before it. The first appellate Court, however, after adverting to the oral and documentary evidence produced by the parties, proceeded to first find fault with the evidence of the defendants to answer the controversy in favour of the plaintiffs. The first appellate Court committed palpable error in not keeping in mind that the initial burden of proof was on the plaintiffs to substantiate their cause for actionable nuisance, which they had failed to discharge. In such a

case, the weakness in the defence cannot be the basis to grant relief to the plaintiffs and to shift the burden on the defendants, as the case may be. Thus understood, the findings and conclusions reached by the first appellate Court will be of no avail to the plaintiffs.

●

329. SUCCESSION ACT, 1925 – Sections 74, 95 and 96
TRANSFER OF PROPERTY ACT, 1882 – Section 54
The testator intended to create an absolutely unfettered right in favour of his wife by virtue of the will – Mere desire for the sale of the property and for the children to get a share in the property therefrom cannot be read as a restricted bar on the absolute right vested with her to deal with the property as she thought fit.

उत्तराधिकार अधिनियम, 1925 – धाराएं 74, 95 एवं 96

संपत्ति अंतरण अधिनियम, 1882 – धारा 54

वसीयत के आधार पर वसीयतकर्ता का आशय अपनी पत्नी के पक्ष में आत्यांतिक अधिकार सृजित करना था – मात्र संपत्ति के विक्रय की इच्छा और संतानों का उसमें अंश प्राप्त करने का आशय संपत्ति के संबंध में संव्यवहार करने के लिए पत्नी में निहित किये गये आत्यांतिक अधिकारों पर प्रतिबंध अधिरोपित किया जाना नहीं समझा जा सकता है।

M.S. Bhavani and anr. v. M.S. Raghu Nandan
Judgment dated 05.03.2020 passed by the Supreme Court in Civil Appeal No. 1798 of 2014, reported in AIR 2020 SC 1441

Relevant extracts from the judgment:

The Right vested under the Will in favour of Nirmala Murthy was an unfettered and absolute right. There is nothing in the wording of the Will which indicates that the testator necessarily required any subsequent sale, mortgage, or lease carried out by Nirmala Murthy to happen with the concurrence or consultation of his children. In fact, when one looks to the circumstances and the family relationship between the testator and his son, it becomes clear that their relations were strained. This is particularly reflected in Ex. P¬17, a letter addressed by Nirmala Murthy to her son, Respondent No. 1 herein, where she specifically alludes to the ill treatment meted out by her son to his sister (Appellant No. 1) and the testator. In light of this, we find that a mere "desire" for the sale of the property and for the children to get a share in the proceeds therefrom cannot be read as a strict bar on the absolute right vested with Nirmala Murthy to deal with the property as she thought fit.

In view of this, we find that the sale deed in question was executed in accordance with the Will dated 07.06.1995 and does not violate its terms. Therefore, Respondent No. 1 is also bound by the same and the finding of the High Court in this regard is liable to be set aside. The Appellants have acquired valid title over the suit property by virtue of the sale deed executed by Nirmala Murthy and are therefore entitled to possession of the same.

●

330. TRANSFER OF PROPERTY ACT, 1882 – Section 106
REGISTRATION ACT, 1908 – Section 17(1)
Lease deed; Compulsory registration of – Whether clause in lease deed stipulating 10% increase in monthly rent each year will make the lease year to year or more than one year requiring compulsory registration? Held – Such clause regarding increased rate of rent by 10% each year was a promise contingent on tenancy being continued beyond one year – Lease deed was not compulsorily registrable.

संपत्ति अंतरण अधिनियम, 1882 – धारा 106
रजिस्ट्रीकरण अधिनियम, 1908 – धारा 17(1)
पट्टा विलेख – अनिवार्य पंजीयन – क्या पट्टा विलेख में यह खण्ड कि मासिक किराए में प्रतिवर्ष 10 प्रतिशत की वृद्धि होगी, पट्टे को वर्षानुवर्षी या एक वर्ष से अधिक का बना देगा, जिसका पंजीयन अनिवार्य है? अभिनिर्धारित – प्रतिवर्ष किराए में 10 प्रतिशत की वृद्धि संबंधी खण्ड किरायेदारी के एक वर्ष से आगे जारी रहने पर समाश्रित वचन था – पट्टा विलेख अनिवार्य रूप से पंजीयन योग्य नहीं था।

Siri Chand (Dead) through LRs. v. Surinder Singh
Judgment dated 17.06.2020 passed by the Supreme Court in Civil Appeal No. 2617 of 2020, reported in (2020) 6 SCC 288 (Three – Judge Bench)

Relevant extracts from the judgment:

Clause (1) of the rent deed specifically makes it clear that monthly tenancy was created on payment of rent of Rs.2,000/- per month. The payment was to be made before 5th of each month to the owner. The rent deed does not provide for any specific period for which the rent deed was executed. When a rent deed/ lease deed does not provide for a period and when it provides for payment of rent monthly, whether tenancy can be treated from year to year or for any term exceeding one year or reserving a yearly rent? The rent deed does not reserve yearly rent, hence the third condition as noted above is not applicable. The rent deed is not also a lease of immovable property from year to year. There is no mention in the rent deed that it is a lease from year to year, hence the said condition is also not applicable.

Only clause which need to be, thus, considered is as to whether the rent deed was "for any term exceeding one year". The present is a case where rent deed does not prescribe any period for which it is executed. When the lease deed does not mention the period of tenancy, other conditions of the lease/rent deed and intention of the parties has to be gathered to find out the true nature of the lease deed/rent deed. The two conditions written in the rent note are also relevant to notice. First, if payment of rent in any month is not made up to 5th of month, owner shall have right to get the shop evicted and second if the owner is in need of shop, he by serving notice of one month can get the shop vacated.

Clauses of the rent note makes it clear that there was a categorical promise that tenancy is a monthly tenancy and rent is paid every month by 5th of every month. It is true that although in clause (9), it was mentioned that the tenant will be bound for making the rent money by increasing 10% each year, that was promise by the tenant to increase the rent by 10% each year for the period of tenancy, though the period of tenancy was unspecified. Clause (9) may or may not operate in view of specific clauses reserving right of landlord to evict the tenant on committing default of non-payment of rent by 5th of every month or when landlord requires shop by giving one month's notice. Clause (9) was a contingent clause which binds the tenant to increase the rent by 10% each year, which was contingent on tenancy to continue for more than a year, but that clause cannot be read to mean that the tenancy was for a period of more than one year.

When the clauses of rent note are cumulatively read, the intention of the tenant is more than clear that tenancy was only monthly tenancy, which could have been terminated on default of payment of rent by 5th day of any month or by notice of one month. The rent deed did not confer any right to tenant to continue in the tenancy for a period of more than one year nor it can be said that tenancy was created for a period of more than one year. Clause (9), which noticed the promise of the tenant of payment of rent by increasing 10% each year was a promise contingent on tenancy being continued beyond one year but cannot make the tenancy year to year or tenancy for a period of more than one year. Present was a case of tenancy for which no period was specified and looking to all the clauses cumulatively, we find that the rent note was not such kind of rent note, which requires compulsory registration under Section 17(1)(d).

●

PART - II A

भरण–पोषण के मामलों से संबंधित माननीय उच्चतम न्यायालय के दिशा–निर्देश*

वर्तमान समय में अंतरिम भरण–पोषण आवेदन न्यायालयों द्वारा अभिवचनों, कुछ अनुमानों और अपरिष्कृत प्राक्कलन के आधार पर विनिश्चित किये जाते हैं और अंतरिम रूप से कुछ राशि निर्धारित कर दी जाती है। प्रायः पक्षकारों द्वारा मामलों में समुचित जानकारी उपलब्ध नहीं कराई जाती है जबकि भरण–पोषण के निर्धारण के लिए पक्षकारों की आय और उनके दायित्वों का विवरण महत्वपूर्ण होता है। इन स्थितियों पर विचार कर माननीय उच्चतम न्यायालय ने ***रजनीश विरुद्ध नेहा, 2020 एससीसी ऑनलाइन 903*** में कुटुम्ब न्यायालय या अन्य न्यायालयों में अंतरिम भरण–पोषण या भरण–पोषण संबंधी आवेदनों के निराकरण के संबंध में दिशा–निर्देश जारी किये हैं। भरण–पोषण आवेदन के साथ पक्षकारों की सम्पत्तियों का विवरण देने संबंधी शपथ पत्र का प्रारूप भी निर्धारित किया है।

इन दिशा–निर्देशों के पालन से भरण–पोषण संबंधी आवेदनों के निराकरण में सहायता मिलेगी व न्यायालय द्वारा सुगमता से उचित राशि का निर्धारण किया जा सकेगा। उक्त आदेश में दिये गये निर्देश संक्षिप्त में निम्नानुसार हैं :–

1. कई अधिनियमों के अंतर्गत भरण–पोषण हेतु आवेदन

1. जहां पक्षकार द्वारा भरण–पोषण हेतु विभिन्न अधिनियमों के अंतर्गत आवेदन प्रस्तुत किये जाते हैं तब न्यायालय पश्चात्वर्ती कार्यवाहियों में अतिरिक्त भरण–पोषण की राशि की आवश्यकता पर विचार करते समय न्यायालय द्वारा पूर्व में पारित भरण–पोषण आदेश में दिलायी गई राशि के समायोजन के आदेश पर भी विचार करेगा।

2. पक्षकारों के लिए यह आज्ञापक है कि वे पूर्व की भरण–पोषण कार्यवाहियों और उनमें पारित आदेश के संबंध में पश्चात्वर्ती कार्यवाहियों में तथ्य स्पष्ट करें।

3. यदि पूर्व की कार्यवाहियों में पारित आदेश में किसी प्रकार के परिवर्तन की आवश्यकता है तो यह उन्हीं (पूर्ववर्ती) कार्यवाहियों में ही होगा।

2. अंतरिम भरण–पोषण

आवेदक के लिए संक्षिप्त आवेदन सहित संपत्तियों के प्रकटीकरण का एक शपथ पत्र प्रस्तुत किया जाना अनिवार्य आवश्यकता है।

इस प्रकार दोनों पक्षों द्वारा प्रस्तुत शपथ पत्रों तथा प्रस्तुत तर्कों के आधार पर, न्यायालय अंतरिम चरण में भरण–पोषण के लिए प्रदान की जाने वाली अनुमानित राशि का एक वस्तुपरक मूल्यांकन करने की स्थिति में होगा।

---

* श्री सुनील कुमार जैन, प्रधान न्यायाधीश, कुटुम्ब न्यायालय, सीधी (म.प्र.) द्वारा प्रेषित आलेख पर आधारित।

3. शपथ पत्र प्रस्तुति

a) प्रारूप 1, 2 व 3 जो भी लागू हो, में दिये गये अनुसार सम्पत्तियों को दर्शाते हुये शपथ पत्र उभयपक्षों द्वारा संबंधित न्यायालय जैसे कुटुम्ब न्यायालय/जिला न्यायालय या मजिस्ट्रेट के समक्ष लंबित मामलों सहित सभी मामलों में प्रस्तुत किया जावेगा।

b) पक्षकार, जो भरण–पोषण का आवेदन प्रस्तुत करता है, संक्षिप्त में आवेदन के साथ उपरोक्तानुसार सम्पत्तियों को दर्शाते हुये शपथ पत्र प्रस्तुत करेगा।

c) प्रत्यर्थी द्वारा जवाब के साथ अपनी सम्पत्तियों को दर्शाते हुये शपथ पत्र अधिकतम 4 सप्ताह के भीतर प्रस्तुत किया जावेगा। न्यायालय द्वारा प्रत्यर्थी को जवाब और शपथ पत्र प्रस्तुत करने हेतु दो से अधिक अवसर नहीं दिये जायेंगे। (जानबूझकर या उद्दण्डता से विलम्ब करने के आशय से)

यदि प्रत्यर्थी द्वारा जवाब व शपथ पत्र प्रस्तुत करने में विलम्ब किया जाता है या दो से अधिक बार स्थगन की मांग की जाती है तो न्यायालय द्वारा उसकी प्रतिरक्षा समाप्त की जा सकती है।

विहित समयावधि में प्रत्यर्थी द्वारा शपथ पत्र प्रस्तुत न किये जाने पर न्यायालय भरण–पोषण आवेदन को आवेदक द्वारा प्रस्तुत शपथ पत्र और अभिलेख पर उपलब्ध अभिवचनों के आधार पर निराकृत करने के लिए अग्रसर होगा।

d) शपथ पत्र का प्रारूप संबंधित न्यायालय द्वारा मामले की परिस्थितियों व आवश्यकताओं को देखते हुये परिवर्तित किया जा सकता है।

e) शपथ पत्र में दी गई जानकारी के अतिरिक्त कोई अतिरिक्त जानकारी आवश्यक है तो न्यायालय द्वारा इस संबंध में उचित आदेश पारित किया जा सकेगा।

f) यदि शपथ पत्र में की गई किसी घोषणा या प्रकटीकरण के संबंध में कोई विवाद हो तो व्यथित पक्ष न्यायालय से दूसरे पक्ष से परिप्रश्नों द्वारा प्रकटीकरण करने और संबंधित दस्तावेज प्रस्तुत कराने हेतु सि.प्र.सं. के आदेश 11 के अंतर्गत न्यायालय से निवेदन कर सकेगा।

शपथ पत्र प्रस्तुत किये जाने के बाद यदि न्यायालय आवश्यक समझे तो सि.प्र.सं. के आदेश 10 या साक्ष्य अधिनियम की धारा 165 के प्रावधानों का उपयेाग कर सकेगा।

एक पक्ष की आय की जानकारी प्रायः दूसरे पक्षकार को नहीं होती है। यदि न्यायालय आवश्यक समझे तो साक्ष्य अधिनियम की धारा 106 के प्रावधानों का उपयोग कर सकता है क्योंकि आय, सम्पत्तियों और देनदारियों या उत्तरदायित्वों की जानकारी स्वयं संबंधित पक्ष के व्यक्तिगत ज्ञान में होती है।

g) यदि कार्यवाहियों के लंबन के दौरान किसी पक्षकार के आर्थिक स्तर में किसी प्रकार का परिवर्तन होता है या कोई नई जानकारी किसी पक्षकार के ज्ञान में आती है तो पक्षकार इस संबंध में संशोधित या अनुपूरक शपथ पत्र प्रस्तुत कर सकता है जो कि न्यायालय द्वारा अंतिम निराकरण के समय विचार में लिया जावेगा।

h) पक्षकारों को आवेदन या जवाब में अभिवचन जिम्मेदारीपूर्ण ढंग से करना चाहिए। यदि मिथ्या कथन किए जाते हैं और दुर्व्यपदेशन किया जाना पाया जाता है तो न्यायालय दण्ड प्रक्रिया संहिता की धारा 340 के अंतर्गत अथवा न्यायालय अवमान की कार्यवाही कर सकता है।

i) पक्षकारों को आर्थिक रूप से कमजोर वर्ग Economicaly Weaker Section (EWS) या Below the Proverty Line (BPL) वर्ग का होने या नैमित्तिक मजदूर होने की दशा में उपरोक्तानुसार शपथ पत्र प्रस्तुति से उन्मुक्ति प्रदान दी जा सकती है।

j) संबंधित कुटुम्ब न्यायालय/जिला न्यायालय या मजिस्ट्रेट न्यायालय प्रकरण में शपथ पत्र प्रस्तुति से अधिकतम 4 से 6 माह की अवधि के भीतर अंतरिम भरण–पोषण आवेदन का निराकरण करने का प्रयत्न करेगा।

k) प्रत्येक कुटुम्ब न्यायालय में पेशेवर (वृत्तिक) विवाह परामर्शदाता की सेवाएं उपलब्ध कराई जाएंगी।

4. लम्बित मामलों में शपथपत्र प्रस्तुत किया जाना

भरण–पोषण के लिए लम्बित सभी आवेदनों में भी माननीय उच्चतम न्यायालय द्वारा निर्धारित प्रारूप 1, 2 या 3 में पक्षकारों द्वारा अपनी सम्पत्तियों व जिम्मेदारियों को स्पष्ट किया जावेगा।

5. स्थाई भरण–पोषण

a) पक्षकारों द्वारा आय, व्यय, जीवन निर्वाह के स्तर व अन्य के संबंध में स्थाई भरण–पोषण के निर्धारण के संबंध में संबंधित न्यायालय में मौखिक व दस्तावेजी साक्ष्य प्रस्तुत की जा सकेगी।

b) भुगतान की जाने वाली स्थायी भरण–पोषण राशि निर्धारित करने के लिए विवाह की अवधि ध्यान में रखा जाने वाला एक प्रासंगिक कारक होगा।

c) स्थायी भरण–पोषण निर्धारित करने के समय, जहाँ बच्चों की अभिरक्षा पत्नी के पास है, वहाँ उनके विवाह के लिए उचित खर्च देने का प्रावधान किया जाना चाहिए। खर्चों का निर्धारण पति की आर्थिक स्थिति और परिवार के रीति–रिवाजों को ध्यान में रखकर किया जाएगा।

d) यदि बच्चों के पक्ष में कोई ट्रस्ट फंड या निवेश है, तो बच्चे से संबंधित समर्थन राशि के निर्धारण के समय इस पर भी ध्यान दिया जाएगा।

6. भरण–पोषण राशि की मात्रा निर्धारित करने हेतु मानदण्ड

अंतरिम या स्थायी भरण–पोषण दिलाये जाने का उद्देश्य यह है कि किसी पक्ष को निराश्रयता और खानाबदोशी से बचाया जावे। परन्तु इसका उद्देश्य दूसरे पक्ष को दण्ड देना भी नहीं है। भरण–पोषण निर्धारण में पक्षकारों के रहन–सहन का स्तर, पत्नी व आश्रित बच्चों की युक्तियुक्त आवश्यकताएं, क्या आवेदक शिक्षित व किसी व्यावसायिक योग्यता से युक्त है? क्या आवेदक के पास स्वतंत्र आय का कोई स्त्रोत है? क्या उसकी आय उसे दाम्पत्य घर में उसके रहने की अवधि के दौरान के उसके स्तर के अनुरूप रखने के लिए पर्याप्त है? क्या आवेदिका विवाह से पूर्व किसी सेवा में थी? क्या वह वैवाहिक स्थिति के दौरान भी कोई कार्य करती थी? क्या पत्नी को अपने रोजगार के अवसर

परिवार के पालन–पोषण व देखभाल के कारण त्यागने पड़े? कितने व्यक्तियों के भरण–पोषण का उत्तरदायित्व अनावेदक पर है, अनावेदक की जिम्मेदारियां यदि कोई हों तो, अनावेदक की भुगतान की योग्यता। काम न करने वाली पत्नी के संबंध में युक्तियुक्त वाद व्यय के खर्च आदि बिन्दुओं पर भी विचार किया जाना चाहिए।

उक्त के अलावा पक्षकारों की उम्र और रोजगार पर भी विचार किया जाना चाहिए। निवास के अधिकार के बारे में भी विचार किया जाना चाहिए। जहां पत्नी कुछ आय अर्जित करती है तो इस बिन्दु पर भी विचार किया जाना चाहिए। अवयस्क बच्चे के भरण–पोषण के बिन्दु के बारे में भी विचार किया जाना चाहिए। किसी पक्षकार की गंभीर बीमारी या शारीरिक अयोग्यता के बिन्दु पर भी विचार किया जाना चाहिए।

7. भरण–पोषण किस दिनांक से देय होगा

यद्यपि न्यायालय द्वारा आवेदन की तिथि से या आदेश की तिथि से भरण–पोषण प्रदान करने के लिए न्यायिक विवेकाधिकार दिया गया है, लेकिन अंतरिम भरण–पोषण के लिए आवेदनों के निराकरण में तात्विक विलंब देखा गया है। इसलिए यह न्यायहित में होगा कि भरण–पोषण आवेदन की दिनांक से आदेशित किया जाए। तदनुसार भरण–पोषण आवेदन दिनांक से देय होगा।

8. भरण–पोषण आदेश का निष्पादन

भरण–पोषण आदेश का निष्पादन हिन्दू विवाह अधिनियम की धारा 28(1), घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम की धारा 20(6) और दण्ड प्रक्रिया संहिता की धारा 128, जो भी प्रावधान लागू होते हों, के अनुसार किया जाना चाहिए। भरण–पोषण आदेश का निष्पादन सिविल न्यायालय की धन की डिक्री के अनुरूप सिविल कारागार, कुर्की आदि के माध्यम से सि.प्र.सं. की धारा 51, 55, 58, 60 सहपठित आदेश 21 या अन्य प्रावधानों के अनुसार भी किया जा सकता है।

प्रतिरक्षा अंतिम उपचार के रूप में उन्हीं परिस्थितियों में समाप्त की जानी चाहिए जहां न्यायालय यह पाता है कि व्यतिक्रम जानबूझकर या उदण्डता पूर्वक किया जा रहा है। सक्षम न्यायालय के समक्ष न्यायालय अवमान की कार्यवाही भी की जा सकती है।

शपथ पत्र

भरण–पोषण आवेदन या आवेदन के जवाब के साथ प्रस्तुत किए जाने वाले शपथपत्रों के तीन प्रारूप माननीय उच्चतम न्यायालय द्वारा निर्धारित किए गए हैं। प्रारूप क्रमांक 3 मेघालय राज्य की जनजातीय परम्पराओं को विचार में लेते हुए उस राज्य के लिए विशेष रूप से बनाया गया है। शेष दो प्रारूप कृषिक व अकृषिक शपथकर्ताओं के लिए अग्रानुसार हैं।

परिशिष्ट I

न्यायालय .....

प्रकरण क्रमांक .....

पक्षकार ..... **याचिकाकर्ता / आवेदक**

बनाम

पक्षकार ..... **प्रतियाची / अनावेदक**

अकृषिक कार्य करने वाले पक्षकार / शपथकर्ता की सम्पत्ति और दायित्वों के संबंध में शपथ पत्र

मैं ..... पिता / पति .....

आयु लगभग ..... वर्ष निवासी ....., शपथ पर अभिवचन व घोषणा निम्नानुसार करती / करता हूँ कि :–

A	**व्यक्तिगत जानकारी :–**	
1.	नाम	
2.	आयु / लिंग	
3.	योग्यता (शैक्षणिक व व्यावसायिक) :	
4.	क्या आवेदक वैवाहिक मकान में / माता–पिता के मकान में / अलग निवासरत् है? आवेदक द्वारा वर्तमान निवास का पता और निवास के स्वामित्व का स्पष्ट विवरण यदि परिवार के अन्य सदस्यों के स्वामित्व का है तो उसका भी विवरण उपलब्ध कराया जावे।	
5.	विवाह की तिथि	
6.	वैवाहिक संबंधों से अलग होने की तिथि	
7.	आवेदक का सामान्य मासिक खर्च (किराया, घरेलू खर्चे, दवाओं के खर्चे, आवागमन के खर्चे आदि)	
B	**वैधानिक कार्यवाहियों के खर्चे और भरण–पोषण यदि कोई दिया जा रहा है, का विवरणः–**	
1.	भरण–पोषण या बच्चों को सहारा देने संबंधी आवेदक व अनावेदक के मध्य की वर्तमान में लंबित या पूर्व में चलाई गई कार्यवाहियों का विवरण।	
2.	क्या किसी घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, दण्ड प्रक्रिया संहिता, हिन्दू विवाह अधिनियम या हिन्दू दत्तक एवं भरण–पोषण अधिनियम के अंतर्गत कार्यवाहियों में कोई भरण–पोषण की राशि दिलायी गई है? यदि हाँ तो उन कार्यवाहियों में दिलाई गई राशि का विवरण।	

3.	यदि राशि दिलाई गई है तो कार्यवाहियों के विवरण आदेश की प्रति सहित प्रस्तुत किए जावें।	
4.	क्या पूर्व की कार्यवाहियों में पारित भरण–पोषण आदेश का पालन किया गया है? यदि नहीं तो बकाया भरण–पोषण का विवरण	
5.	क्या आवेदक द्वारा स्वेच्छा से भरण–पोषण के संबंध में कोई सहयोग प्रदान किया जा रहा है या भविष्य में प्रदान किया जायेगा? यदि हां तो इसका विवरण।	
C	**परिवार के आश्रित सदस्यों के विवरण :–**	
1.	परिवार के आश्रित सदस्य यदि कोई हों।	
अ.	आश्रित से संबंध।	
ब.	आश्रित/आश्रितों की आयु व लिंग	
2.	आश्रित की स्वतंत्र आय या आय के स्त्रोत के संबंध में विवरण जिसमें ब्याज की आय, सम्पत्तियों, पेंशन, आय पर कर दायित्व और इसी प्रकार के अन्य सुसंगत विवरण।	
3.	आश्रित पर खर्च होने वाले व्ययों की अनुमानित राशि।	
D	**शपथकर्ता व आश्रित सदस्य के चिकित्सीय विवरण, यदि कोई हों।**	
1.	क्या पक्षकार या बच्चे या बच्चे किसी शारीरिक या मानसिक अयोग्यता से ग्रस्त हैं या किसी अन्य गंभीर बीमारी से ग्रस्त है? यदि हां तो इस संबंध में चिकित्सा पत्र प्रस्तुत किए जावें।	
2.	क्या परिवार के किसी सदस्य को कोई गंभीर अयोग्यता है और उसके ईलाज हेतु निरंतर चिकित्सा व्ययों की आवश्यकता है? यदि हां तो अयोग्यता प्रमाण पत्र और चिकित्सा व्यय के खर्चों का विवरण।	
3.	क्या कोई पक्षकार या संतान या अन्य कोई परिवार का आश्रित सदस्य जीवन को संकटापन्न बनने वाली किसी बीमारी से ग्रस्त है? जिसके नियमित चिकित्सा खर्चे हों? यदि हाँ तो अस्पताल व चिकित्सा व्ययों का विवरण।	
E	**बच्चों का विवरण :–**	
1.	वर्तमान विवाह से/वैवाहिक संबंधों से/पूर्व विवाह से उत्पन्न संतानें।	
2.	बच्चों के नाम व आयु	
3.	माता/पिता जिसकी अभिरक्षा में बच्चें हैं, का विवरण।	
4.	आश्रित बच्चों के व्ययों का विवरण	
अ.	भोजन, कपड़े व चिकित्सा खर्चे	

ब.	शिक्षा व अन्य सामान्य खर्चे	
स.	अतिरिक्त शिक्षा या किसी व्यावसायिक/शिक्षण कोर्स, विशेष प्रशिक्षण या विशेष कौशल कार्यक्रम से संबंधित आश्रित बच्चों के खर्चे।	
द.	बच्चों की शिक्षा से संबंधित किसी ऋण, बंधक, भार या किश्त (जो कि दी जानी है या दी जा रही है) का विवरण।	
5.	क्या किसी पक्षकार द्वारा स्वेच्छया से बच्चों की शिक्षा आदि पर कोई सहयोग किया जाता है? यदि हाँ, तो इसका विवरण। संभावित अतिरिक्त सहयोग राशि का आंकलित विवरण भी प्रस्तुत किया जावे।	
6.	क्या बच्चों की शिक्षा खर्चों में किसी तृतीय पक्ष द्वारा भी कोई आर्थिक सहयोग प्रदान किया जाता है?	
F	**अभिकथनकर्ता की आय का विवरण :–**	
1.	नियोक्ता का नाम	
2.	पद	
3.	मासिक आय	
4.	यदि शासकीय सेवा में है तो वर्तमान वेतन प्रमाण पत्र या पे स्लिप, यदि वेतन सीधे बैंक में जमा किया जाता है तो बैंक जमा खाते का विवरण।	
5.	यदि किसी प्राइवेट सेक्टर में नियोजित है तो नियोक्ता द्वारा दिया गया प्रमाण पत्र जिसमें पद, कुल मासिक आय का विवरण हो व वर्तमान सेवा अवधि का फार्म 16 संलग्न हो।	
6.	क्या सेवा शर्तों के अनुरूप कोई लाभ यथा गृह भाड़ा भत्ता, यात्रा भत्ता, महंगाई भत्ता या अन्य कोई सेवा लाभ नियोक्ता द्वारा प्रदान किये जाते हैं?	
7.	क्या आयकर की गणना की जाती है। यदि हाँ तो निम्नानुसार आयकर रिटर्न की प्रति प्रस्तुत की जावे :–	
(i)	विवाह से एक वर्ष पूर्व की समयावधि का आयकर रिटर्न।	
(ii)	अलग होने के एक वर्ष पूर्व का आयकर रिटर्न।	
(iii)	भरण–पोषण आवेदन प्रस्तुत किये जाने के समय का आयकर रिटर्न।	
8.	आय के अन्य स्त्रोतों जैसे किराया, ब्याज, शेयर, डिविडेंट, केपीटल गेन, एफडीआर, पोस्ट आफिस जमा, म्युचुअल फण्ड, स्टॉक, डिबेंचर्स, कृषि या व्यवसाय, यदि कोई हो, से प्राप्त आय का विवरण और इस आय के संबंध में कर कटौत्रों (टीडीएस) का विवरण।	
9.	पिछले 03 वर्षों के समस्त बैंक खाते के स्टेटमेन्ट्स की प्रतियां।	

G	**आवेदक द्वारा धारित चल अचल सम्पत्तियों के विवरण :–**	
1.	स्वयं द्वारा अर्जित कोई सम्पत्ति, यदि हो।	
2.	विवाह के पश्चात् पक्षकार द्वारा संयुक्त रूप से धारित कोई सम्पत्ति।	
3.	पूर्वजों की सम्पत्ति में अंश यदि कोई हो।	
4.	पक्षकार की अन्य संयुक्त सम्पत्ति खाते (खाते/ निवेश/ एफडीआर/ म्युचुअल फण्ड/ स्टॉक/ डिबेंचर्स आदि) उनका मूल्य और आधिपत्य की स्थिति।	
5.	अचल सम्पत्ति के कब्जे की स्थिति, किराया, लीज़ आदि का विवरण।	
6.	आवेदक द्वारा दिये गये या लिये गये ऋण का विवरण।	
7.	विवाह के दौरान या पश्चात् पक्षकारों द्वारा अर्जित किये गये आभूषणों का संक्षिप्त विवरण।	
8.	आवेदक द्वारा पूर्व में धारित सम्पत्ति के अंतरण या संव्यवहार से संबंधित विवरण जो विवाह के अस्तित्व में रहने के दौरान किये गये हों। इस विक्रय या अंतरण के कारणों का संक्षिप्त विवरण।	
H	**आवेदक या अभिसाक्षी की जिम्मेदारियों या देनदारियों का विवरण :–**	
1.	ऋण, दायित्व बंधक या आवेदक पर बकाया भार यदि कोई हो का विवरण।	
2.	मासिक किश्त यदि कोई अदा की जा रही हो, का विवरण।	
3.	ऋण या दायित्व लिये जाने की तारीख और उसका उद्देश्य।	
4.	उधार ली गई वास्तविक राशि, यदि कोई हो और शपथ पत्र प्रस्तुत किये जाने की तिथि और वापस अदा की गई राशि का विवरण।	
5.	अन्य कोई जानकारी जो आवेदक की वर्तमान जिम्मेदारियों या देनदारियों के संबंध में सुसंगत हो।	
I	**स्वरोजगार वाले व्यक्ति/व्यवसायी/आंत्रप्रेन्योर या उद्यमी।**	
1.	आवेदक के कार्य/व्यवसाय का संक्षिप्त विवरण।	
2.	क्या कार्य/व्यवसाय व्यक्तिगत रूप से किया जाता है या सोल प्रोपराइटर या भागीदारी कंसर्न, एलएलपी (LLP) कंपनी या व्यक्तियों का संगठन, HUF या संयुक्त परिवार का व्यवसाय या किसी अन्य स्वरूप में है? आवेदक के व्यवसाय में हिस्से का विवरण दिया जावे। भागीदारी की दशा में लाभ हानि के अंश का विवरण दिया जावे।	
3	कार्य/व्यवसाय से कुल आय।	
4.	कार्य/व्यवसाय की देनदारियां या जिम्मेदारियां यदि कोई हों।	

5.	कंपनी के व्यवसाय की दशा में अंतिम लेखा परीक्षण की बैलेंस शीट जो कंपनी के लाभ व हानि दर्शाए।	
6.	भागीदारी फर्म की दशा में अंतिम आयकर रिटर्न प्रस्तुत किया जावे।	
7.	स्वरोजगार की दशा में अंतिम आयकर का रिटर्न प्रस्तुत किया जावे।	
J	**आवेदक द्वारा अनावेदक की आय, सम्पत्ति और जिम्मेदारियों के संबंध में जानकारी :–**	
1.	अनावेदक की शिक्षा और व्यावसायिक योग्यता के संबंध में जानकारी।	
2.	क्या अनावेदक पति या पत्नी द्वारा कोई आय अर्जित की जाती है? यदि हां तो उसके व्यवसाय व आय के संबंध में विवरण।	
3.	यदि आय अर्जित नहीं की जाती है तो क्या वह अपने स्वयं के आवास में/किराये के आवास में या नियोक्ता द्वारा उपलब्ध कराए गए या व्यवसाय या भागीदारी के संबंध में उपलब्ध आवास में निवास करता है।	
4.	प्रतिपक्ष पति या पत्नी की सम्पत्तियों व जिम्मेदारी जिसकी जानकारी आवेदक को हो से, संबंधित दस्तावेज।	
K	**आवेदक या प्रतिपक्ष पति या पत्नी के अप्रवासी भारतीय/भारत का अन्य देश का नागरिक/विदेशी नागरिक या व्यक्ति जो भारत से बाहर निवास करता है, का विवरण।**	
1.	नागरिकता, राष्ट्रीयता और वर्तमान निवास स्थान का विवरण यदि आवेदक या प्रतिपक्ष पति या पत्नी भारत से बाहर स्थायी या अस्थायी रूप से निवास करता हो।	
2.	आवेदक या प्रतिपक्ष पति या पत्नी का वर्तमान व्यवसाय और वर्तमान विदेशी मुद्रा में आय का विवरण विदेशी नियोक्ता या संस्था द्वारा जारी आय व सेवा के सुसंगत दस्तावेजों व बैंक खाते के विवरण सहित।	
3.	आवेदक या प्रतिपक्ष पति या पत्नी जो विदेश में निवास करता है, के घरेलू व अन्य खर्चों का विवरण।	
4.	आवेदक या प्रतिपक्ष पति या पत्नी का विदेशी क्षेत्र में कर दायित्व।	
5.	आवेदक या प्रतिपक्ष पति या पत्नी के भारत व विदेशी क्षेत्र में अन्य स्त्रोतों से आय का विवरण।	
6.	आवेदक या प्रतिपक्ष पति या पत्नी के द्वारा पति या पत्नी को, बच्चों को सहारा, शिक्षा या चिकित्सा हेतु दिये जाने वाले खर्चे या आंशिक सहयोग का विवरण।	
7.	उपरोक्त में कवर न होने वाली अन्य कोई जिम्मेदारियां या परिवार के किसी अन्य सदस्य जो भारत में निवास करता हो या विदेश में की आश्रितता व जिम्मेदारियों का विवरण।	

घोषणा

1. मैं घोषणा करता/करती हूं कि मैंने अपनी आय, खर्चें और सम्पत्तियों और जिम्मेदारियों के समस्त स्त्रोतों के संबंध में पूर्ण व सही जानकारी को प्रकट किया है। मैं यह भी घोषणा करता/करती हूं कि इस शपथ पत्र में वर्णित के अलावा मेरे पास अन्य कोई सम्पत्ति, आय, व्यय, जिम्मेदारियां नहीं हैं।

2. मैं यह वचन देता/देती हूं कि इस शपथपत्र में वर्णित मेरे रोजगार, सम्पत्ति, आय या खर्चों में किसी प्रकार का सारभूत परिवर्तन होने पर मैं इसकी सूचना तुरन्त न्यायालय को दूंगा/दूंगी।

3. मुझे इस बात की जानकारी है कि इस शपथ पत्र में किसी भी प्रकार का असत्य विवरण दिये जाने की दशा में न्यायालय अवमान के अलावा मेरा कार्य भारतीय दण्ड संहिता की धारा 199 सहपठित धारा 191 और 193 के अंतर्गत दण्डनीय होगा जो 07 वर्ष तक के कारावास और अर्थदण्ड के दण्ड से दण्डनीय है और धारा 209 भारतीय दण्ड संहिता जो कि 02 वर्ष तक के कारावास और अर्थदण्ड के दण्ड से दण्डनीय है। मैंने भारतीय दण्ड संहिता, 1860 की धारा 191, 193, 199 और 209 को पढ़ और समझ लिया है।

शपथकर्ता

सत्यापन

मैं ..... पिता ..... पति ..... आज दिनांक ..... को शहर ..... में यह सत्यापित करता/करती हूं कि उपरोक्त शपथ पत्र के समस्त तथ्य मेरे व्यक्तिगत ज्ञान के आधार पर सत्य हैं। शपथ पत्र में कोई भी बात गलत नहीं लिखाई गई है और कोई भी सारभूत बात छिपाई नहीं गई है। जहां तक शपथ पत्र में मेरे पति/पत्नी की सम्पत्ति, आय या खर्चों का विवरण दिये गये हैं वे मुझे प्राप्त जानकारी और मेरे विश्वास व अभिलेख के आधार पर सत्य हैं। मैं यह भी सत्यापित करता हूं कि शपथ पत्र के साथ मूल की प्रतिलिपियां संलग्न हैं।

शपथकर्ता

परिशिष्ट–2

न्यायालय .....

प्रकरण क्रमांक .....

पक्षकार ..... **याचिकाकर्ता / आवेदक**

बनाम

पक्षकार ..... **प्रतियाची / अनावेदक**

कृषि कार्य करने वाले पक्षकार / शपथकर्ता की सम्पत्ति और दायित्वों के संबंध में शपथ पत्र

मैं ..... पिता ..... आयु लगभग ..... वर्ष निवासी ....., शपथ पर अभिवचन व घोषणा निम्नानुसार करती / करता हूँ कि :–

क्र.		
1.	आवेदक द्वारा धारित ग्रामीण भूमि या भूमियां या भूमि में के स्पष्ट अंश का विवरण।	
2.	स्वामित्व संबंधी जमाबंदी / नामांतरण जो भी हो	
3.	पक्षकार द्वारा धारित भूमि की अवस्थिति (लोकेशन)।	
4.	भूमि सिंचित है अथवा असिंचित	
5.	क्या भूमि कृषि भूमि है या अकृषि	
6.	कृषि या बागवानी (उद्यानिकी) का प्रकार।	
7.	वर्ष के दौरान ली जाने वाली फसल का प्रकार।	
8.	यदि ग्राम की भूमि कृषि योग्य नहीं है तो क्या उसका उपयोग व्यवसाय, लीज या अन्य किसी अन्य कार्य हेतु किया जाता है।	
9.	भूमि से पिछले तीन वर्षों में प्राप्त आय का विवरण	
10.	क्या कोई भूमि लीज / बटाई (या उस स्थानीय क्षेत्र में लीज हेतु प्रचलित या परिभाषित किसी अन्य प्रकार से) ली गई है।	
11(a)	क्या स्वामी के पास पशुधन (Livestock) जैसे भैंसें, गायें, बकरियां, अन्य पशु, मुर्गीयां, मछलियां, मधुमक्खी पालन, सुअर पालन आदि हैं तो उनकी संख्या व उससे प्राप्त आय।	
11(b)	क्या आवेदक डेयरी या दूध उद्योग, मुर्गी पालन, मछली पालन या अन्य किसी पशु पालन गतिविधि में संलग्न है।	

12.	भूमि के प्रति यदि कोई लोन प्राप्त किया गया हो तो उसके विवरण प्रस्तुत किए जावें।	
13.	अन्य कोई आय का स्त्रोत।	
14.	उत्तरदायित्व यदि कोई हो।	
15.	अन्य कोई सुसंगत जानकारी।	

घोषणा

1. मैं घोषणा करता/करती हूं कि मैंने अपनी आय, खर्चें और सम्पत्तियों और जिम्मेदारियों के समस्त स्त्रोतों के संबंध में पूर्ण व सही जानकारी को प्रकट किया है। मैं यह भी घोषणा करता/करती हूं कि इस शपथ पत्र में वर्णित के अलावा मेरे पास अन्य कोई सम्पत्ति, आय, व्यय, जिम्मेदारियां नहीं हैं।

2. मैं यह वचन देता/देती हूं कि इस शपथपत्र में वर्णित मेरे रोजगार, सम्पत्ति, आय या खर्चों में किसी प्रकार का सारभूत परिवर्तन होने पर मैं इसकी सूचना तुरन्त न्यायालय को दूंगा।

3. मुझे इस बात की जानकारी है कि इस शपथ पत्र में किसी भी प्रकार का असत्य विवरण दिये जाने की दशा में न्यायालय अवमान के अलावा मेरा कार्य भारतीय दण्ड संहिता की धारा 199 सहपठित धारा 191 और 193 के अंतर्गत दण्डनीय होगा जो 07 वर्ष तक के कारावास और अर्थदण्ड के दण्ड से दण्डनीय है और धारा 209 भारतीय दण्ड संहिता जो कि 02 वर्ष तक के कारावास और अर्थदण्ड के दण्ड से दण्डनीय है। मैंने भारतीय दण्ड संहिता, 1860 की धारा 191, 193, 199 और 209 को पढ़ और समझ लिया है।

शपथकर्ता

सत्यापन

मैं ..... पिता ..... पति ..... आज दिनांक .....
को शहर ..... में यह सत्यापित करता/करती हूं कि उपरोक्त शपथ पत्र के समस्त तथ्य मेरे व्यक्तिगत ज्ञान के आधार पर सत्य हैं। शपथ पत्र में कोई भी बात गलत नहीं लिखाई गई है और कोई भी सारभूत बात छिपाई नहीं गई है। मैं यह भी सत्यापित करता/करती हूं कि शपथ पत्र के साथ मूल की प्रतिलिपियां संलग्न हैं।

शपथकर्ता

PART - IV

IMPORTANT CENTRAL/STATE ACTS, RULES & AMENDMENTS

THE DISTRICT COURTS OF MADHYA PRADESH VIDEO CONFERENCING AND AUDIO-VISUAL ELECTRONIC LINKAGE RULES, 2020

With intent to avoid delay in judicial proceeding due to non-availability of parties, counsels, witnesses and accused, there is an urgent need for a user-friendly video conferencing facility and other modes of audio-visual electronic linkage for the purpose of hearing of the cases as well as recording of evidence of witnesses unable to attend the Court. The information technology is a good tool for speedy trial and speedy justice.

The video conferencing will be an integrated web technology capable of running seamlessly over Internet/Intranet, Virtual Private Network (VPN) of witness, accused and other stakeholders.

Therefore, in exercise of the powers, conferred by Article 227 of the Constitution of India, read with Section 122 of the Code of Civil Procedure, 1908 (5 of 1908), Section 23 of the Madhya Pradesh Civil Courts Act, 1958 and Section 477 of the Code of Criminal Procedure, 1973 (2 of 1974), the High court of Madhya Pradesh hereby, makes the following rules regulating practice and procedure pertaining to use of video conferencing for District Courts of Madhya Pradesh, namely:-

CHAPTER I
PRELIMINARY

1. Short title, Application and Commencement. –

(i) These Rules shall be called the "The District Courts of Madhya Pradesh Video Conferencing and Audio-Visual Electronic Linkage Rules, 2020".

(ii) They shall apply to Courts.

(iii) They shall come into force from the date of their notification in the Official Gazette*.

2. Definitions. –

(i) In these Rules, unless the context otherwise requires, -

(a) **"Advocate"** means and include an advocate entered in any roll maintained under the provisions of the Advocates Act, 1961 and shall also include government pleaders and officers of the department of public prosecution;

* Published in Gazette of Madhya Pradesh No. 47 dated 20th November, 2020.

(b) **"Commissioner**" means a person appointed as commissioner under the provisions of Code of Civil Procedure, 1908 (5 of 1908), or the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force;

(c) **"Coordinator"** means a person nominated as coordinator under Rule 5;

(d) **"Court"** means Civil Courts established under Civil Courts Act, 1958, Criminal Courts as defined in Code of Criminal Procedure, 1973 (other than Court of Executive Magistrate), any other Special Courts established under any Special Act, Family Courts, Juvenile Justice Board(s) in the State of Madhya Pradesh and shall includes a physical court and a virtual court or tribunal;

(e) **"Court Point"** means the courtroom or one or more places where the court is physically convened, or the place where a commissioner or an inquiring officer holds proceedings pursuant to the directions of the court;

(f) **"Court Room"** means the place or room or enclosed space in which court of law is held in front of the judge(s);

(g) **"Court User"** means a user participating in court proceedings through video conferencing at a court point and includes presiding judge of court;

(h) **"Designated Video Conferencing software"** means a software approved by the High court for the use of video conferencing;

(i) **''Electronic records"** shall bear the same meaning as assigned under the Information Technology Act, 2000;

(j) **"Exceptional circumstances"** includes a pandemic, natural calamities, circumstances affecting law and order where it is expedient for effective administration of justice and any other matter relating to the safety of the advocates, accused persons, witnesses or any other required to be present before the court and includes any such incident or circumstances which may be declared to be an "exceptional circumstance" by the court;

(k) **"Live Link"** means and includes a live television link, audio-video electronic means or other arrangements whereby a witness, an accused, party, pleader, advocate (s) or any other person required by court to remain present in the court while physically absent from the courtroom is nevertheless virtually present in the courtroom by remote communication using technology to give evidence and be cross-examined or to present arguments or assist the Court or for any other purpose in a judicial proceeding;

(l) **"Institutional Remote Point"** means the courtroom or one or more places in the court complex where the remote point is physically convened for facilitating the audio-visual electronic linkage with courts points;

(m) **"Remote Point"** is a place where any person or persons are required to be present or appear through a video link;

(n) **"Remote User"** means a user participating in court proceedings through video conferencing at a remote point.

(o) **"Required Person"** includes:

(i) the person who is to be examined as a witness or otherwise: or

(ii) person in whose presence certain proceedings are to be recorded or conducted; or

(iii) an advocate or a party in person who intends to examine a witness; or

(iv) any person who is required to make submissions before the court; or

(v) any other person who is permitted by the court to appear through video conferencing or other modes of audio visual electronic linkage;

(p) **"Rules"** shall mean these rules and any reference to a rule, sub-rule or schedule shall be a reference to a rule, sub-rule or schedule of these rules;

(q) **"Video conferencing"** means and includes to conduct a conference between two or more participants at different sites by using computer networks to transmit audio and video data.

(2) The words and phrases used but not defined herein shall bear the same meaning as assigned to them in M.P. Civil Court Rules, 1961; Rules and Orders (Criminal); Code of Civil Procedure, 1908; Code of Criminal Procedure, 1973; Information Technology Act, 2000 and the General Clauses Act, 1897.

CHAPTER II
GENERAL PRINCIPLES

3. General Principles Governing Video Conferencing and other modes of audio-visual electronic linkage. –

(a) Video conferencing and other modes of audio-visual electronic linkage facility may be used at all stages of judicial proceedings and proceedings conducted by the court, where a person is required to be present or appear is located intra-state; inter-state or overseas.

(b) all proceedings conducted by a Court by way of video conferencing and other modes of audio-visual electronic linkage shall be judicial proceedings and all the courtesies and protocols applicable to a physical court shall apply to these virtual proceedings. The protocol provided in schedule I shall be adhered to for proceedings conducted by way of video conferencing and other modes of audio-visual electronic linkage.

(c) All relevant statutory provisions applicable to judicial proceedings including, but not limited to provisions of the M.P. Civil Court Rules, 1961; Rules and Orders (Criminal): Code of Civil Procedure, 1908 (hereinafter it will be called "C.P.C.") Code of Criminal Procedure, 1973 (hereinafter it will be called "Cr.P.C.) Contempt of Courts Act, 1971, Indian Evidence Act, 1872 (abbreviated hereafter as the Evidence Act) and Information Technology Act, 2000 (abbreviated hereafter as the IT Act), shall apply to proceedings conducted by video conferencing and other modes of audio-visual electronic linkage.

(d) Subject to maintaining independence, impartiality and credibility of judicial proceedings and subject to such directions as the Chief Justice may issue, courts may adopt such technological advances as may become available from time to time for ensuring proper conduction of proceedings through video conferencing and other modes of audio-visual electronic linkage.

(e) The rules as applicable to a court shall *mutatis mutandis* apply to a commissioner appointed by the court to record evidence and to an inquiry officer conducting an inquiry.

(f) Unless expressly permitted, no person or entity, either at Court Point or at Institutional Remote Point or at Remote Point, shall be permitted to record the proceedings conducted by video conferencing or other modes of audio-visual electronic linkage. In case of violation it will be punishable in accordance with law.

(g) The person defined in rule 2 (i)(o) shall provide identity proof as recognized by the Government of India/State Government/ Union Territory to the court point coordinator via personal email. In case identity proof is not readily available the person concerned shall furnish the following personal details: name, parentage and permanent address, temporary address if any and will make available as per direction of the court, however the court may, upon satisfaction allow such person to participate in proceedings without production of identity proof.

4. Facilities recommend for Video Conferencing. –

The following equipment is recommended for conducting proceedings by video conferencing at the Court Point and at the Institutional Remote Point:

(i) desktop, laptop, mobile devices with uninterrupted internet connectivity and printer;

(ii) device ensuring uninterrupted power supply;

(iii) video camera;

(iv) microphones and speakers;

(v) display unit;

(vi) document visualizer;

(vii) provision of a firewall;

(viii) adequate seating arrangements ensuring privacy;

(ix) adequated lighting;

(x) availability of a quiet and secure space;

(xi) scanner including mobile scanner.

5. Preparatory Arrangements. –

(1) There shall be a Coordinator both at the Court Point and at the institutional Remote Point from which any required person is to be examined or heard or is directed to remain present. However, coordinator may be required at the remote point only when a witness or a person accused of an offence is to be examined.

(2) In all civil and criminal courts, the persons nominated by the High Court or the concerned District Judge within whose jurisdiction the respective civil or criminal court is present, shall perform the functions of the coordinators at the Court Point as well as the Remote Point as provided in sub-rule (3)

(3) The coordinator at the Remote Point may be any of the following:

Clause	Where the Advocate or Required Person is at the following Remote Point	The Remote Point Coordinator Shall be
(a)	Overseas	An official of the relevant an Indian Consulate/ Indian Embassy/ High Commission of India/ duly certified Notary Public/ Oath Commissioner
(b)	Court of another state or union territory within the territory of India	Any authorized official nominated by the concerned District Judge
(c)	Mediation Centre or office of District Legal Services Authority (including Taluka Legal Services Committee)	Any Authorized official nominated by the Chairperson or Secretary of the concerned District Legal Services Authority

Clause	Where the Advocate or Required Person is at the following Remote Point	The Remote Point Coordinator Shall be
(d)	Jail or prison	The concerned Jail Superintendent or Officer in-charge of the prison or any other responsible official nominated by him
(e)	Hospital, Public or Private, (whether run by the Central Government, the State Government, local bodies or any other person)	Medical Superintendent or an official authorized by them or the person in charge of the said hospital
(f)	Observation Home, Special Home, Children's Home, Shelter Home, or any institution referred to as a child facility (collectively referred to as child facilities) and where the required person is a juvenile or a child or a person who is an inmate of such child facility	The superintendent or Officer in charge of that child facility or an official authorized by them
(g)	Women's Rescue Homes, Protection Homes, Shelter Homes, Nari Niketans or any institution referred to as a women's facility (collectively referred to as women's facilities)	The Superintendent or officer in-charge of that women facility or an official authorized by them
(h)	In custody, care or employment of any other government office, organization or institution (collectively referred to as institutional facilities)	The Superintendent or Officer-in-charge of the institutional facility or an official authorized by them
(i)	Forensic Science Lab	The Administrative Officer in-charge or their nominee
(j)	In case of any other person	The concerned Court may appoint any person deemed fit and proper who is ready and willing to render their services as a coordinator to ensure that the proceedings are conducted in a fair, impartial and independent manner and according to the directions issued by the Court in that behalf

(4) When a Required person is at any of the Remote Points mentioned in sub rules (3) and video conferencing facilities are not available at any of these places the concerned court may formally request the Principal District Judge, in whose jurisdiction the Remote point is situated to appoint a coordinator for and to provide a video conferencing facility from proximate place and suitable court premises.

(5) The Coordinator at both court Points and Institutional Remote Points shall ensure that requirements set out in Rule 4 are complied with, so that the proceedings are conducted seamlessly.

(6) The coordinator at the Remote Point shall ensure that;

(a) all advocates and/or required persons scheduled to appear in a particular proceeding are ready at the Remote Point designated for video conferencing at least 30 minutes before the scheduled time;

(b) no unauthorized recording device is used;

(c) no unauthorized person enters the video conference room when the video conference is in progress;

(d) the person being examined is not prompted, tutored, coaxed, induced or coerced in any manner by any person and that the person being examined does not refer to any document, script or device without the permission of the court concerned during the course of examination.

(7) Where the witness to be examined through video conferencing requires or if it is otherwise expedient to do so, the Court shall give sufficient notice in advance, setting out the schedule of video conferencing and in appropriate cases may transmit non-editable digital scanned copies of all or any part of the coordinator of the concerned Remote Point designated in accordance with sub-rule (3).

(8) Before the schedule video conferencing date, the coordinator at the Court point shall ensure that the coordinator at the Institutional Remote Point or Remote Point receives certified copies, printouts or a soft copy of the non-editable scanned copies of all or any part of the record of proceedings which may be required for recording statements or evidence, or for reference. However, these shall be permitted to be used by the Required Person only with the permission of the court.

(9) Where Required person is connected from a place which is not a Remote Point, or where no coordinator is available at Remote Point, court shall ensure that Required Person receives all copies as mentioned in preceding rule.

(10) Whenever require the court shall order the coordinator at the Remote point or a the Court point to provide-

(a) a translator in case the person to be examined is not conversant with the official language of the court;

(b) an expert in sign languages in case the person to be examined is impaired in speech and/or hearing;

(c) an interpreter or a special educator, as the case may be, in case a person to be examined is differently abled, either temporarily or permanently;

(d) a person for reading of documents in case the person to be examined is visually challenged.

CHAPTER III
PROCEDURE FOR VIDEO CONFERENCING

6. Application for Appearance, Evidence and Submission by Video Conferencing.-

(1) Any party to the proceeding or witness, save and except where proceedings are initiated at the instance of the court or public prosecutor, may move a request for video conferencing. A party or witness seeking a video conferencing proceeding shall do so by making a request in the form prescribed in schedule II.

(2) In the civil cases, any proposal to move a request to for video conferencing should first be discussed with the other party or parties to the proceeding, except where not possible or inappropriate, for example in cases such as urgent applications. However the court may, as its discretion, initiate process for hearing or any case through video conferencing and other modes of audio-visual electronic linkage.

(3) On receipt of such a request and upon hearing all concerned persons the court will pass an appropriate order after ascertaining that the application is not filed with an intention to impede a fair trial or to delay the proceedings.

(4) While allowing a request for video conferencing the Court may also fix the schedule for convening the video conferencing.

(5) In case the video conferencing event is convened for making oral submissions, the order may require the advocate or party in person to submit written arguments and precedents, if any, in advance on the official email ID of the court concerned.

(6) Costs, if directed to be paid, shall be deposited within the prescribed time, commencing from the date on which the order convening proceedings through video conferencing is received.

7. Service of Summons.-

Summons issued to a witness who is to be examined through video conferencing, shall mention the date, time and venue of the concerned Remote Point and shall direct the witness to attend in person alongwith proof of identity or an affidavit to that effect. Such summons may be served through electronic means. However, the existing rules regarding service of summons and the consequences for non-attendance, as provided in the C.P.C. and Cr.P.C. shall apply with respect to service of summons for proceedings conducted by video conferencing.

8. Examination of persons through video conferencing and other modes of audio-visual electronic linkage.-

(1) Any person being examined, including a witness shall before being examined through video conferencing, produce and submit proof of identity by submitting and identity document issued or duly recognized by the Government of India, State Government, Union Territory, or in the absence of such a document, an affidavit attested by any of the authorities referred to in section 139 of the C.P.C. or section 297 of the Cr.P.C. as the case may be. The affidavit will inter alia state that the person who is shown to be the party to the proceedings or as a witness, is the same person, who is to depose at the virtual hearing. A copy of the proof of identity or affidavit, as the case may be, will be made available to the opposite party:

Provided that in absence of identity proof as required in sub-rule (1) the identity of the person required to be present or appear shall be confirmed by the court with the assistance of the co-ordinator at remote point at the time of proceedings through video conferencing.

(2) The person being examined will ordinarily be examined during the working hours of the court concerned or at such time as the court may deem fit. The oath will be administered to the person being examined by the coordinator at the Court Point.

(3) Where the person being examined or accused to be presented is in custody, the statement or, as the case may be, the testimony may be recorded through video conferencing. The court shall provide adequate opportunity to the under-trial prisoner to consult with their counsel before and after the video conferencing.

(4) Subject to the provisions for examination of witnesses contained in the Evidence Act, before the examination of the witness, the documents, if any, sought to be relied upon shall be transmitted by the applicant to the witness so that the witness acquires familiarity with the said documents. The applicant will submit an acknowledgement with the court in this behalf.

(5) If a person is examined with reference to a particular document then the summon to witness must be accompanied by a duly certified photocopy of the document. The original document should be exhibited at the Court Point in accordance with the deposition of the concerned person being examined.

(6) The court would be at liberty to record the demeanour of the person being examined.

(7) The Court will note the objection raised during the deposition of the person being examined and rule on them.

(8) The Court shall obtain the signature of the person being examined on the transcript once the examination is concluded. The signed transcript will form part of the record of the judicial proceedings. The signature on the transcript of the person being examined shall be obtained in either of the following ways.-

(a) If digital signatures are available at both the concerned Court Point and Remote Point, the soft copy of the transcript digitally signed by the presiding judge at the Court Point shall be sent by the official e-mail to the Remote Point where a print out of the same will be taken and signed by the person being examined. A scanned copy of the transcript digitally signed by the coordinator at the Remote Point would be transmitted by official email of the Court Point. The hard copy of the signed transcript will be dispatched after the testimony is over, preferably within three days by the coordinator at the Remote Point to the Court Point by recognised courier/registered speed post.

(b) If digital signatures are not available, the printout of the transcript shall be signed by the presiding Judge and the representative of the parties, if any, at the Court Point and shall be sent in non-editable scanned formate to the official email account of the remote point where a printout of the same will be taken and signed by the person examined and countersigned by the Coordinator at the Remote Point. A non-editable scanned formate of the transcript so signed shall be sent by the Coordinator of the Remote Point to the official email account of the Court Point where a print out of the same will be taken and shall be made a part of the judicial record. The hard copy would also be dispatched preferably within three days by the Coordinator at the Remote Point to the Court Point by recognised courier/ registered speed post.

(9) An audio-visual recording of the examination of witnesses shall be prepared at the Court Point. An encrypted master copy with hash value shall be retained as a part of the record.

(10) The court may, at the request of a person to be examined, or on its own motion, taking into account the best interest of the person to be examined, direct appropriate measures to protect the privacy of the person examined bearing in mind aspects such as age, gender, physical condition and recognized customs and practices.

(11) The coordinator at the Remote Point shall ensure that no person is present at the Remote Point, save and except the person being examined and those whose presence is deemed administratively necessary by the coordinator for the proceedings to continue.

(12) The court may also impose such other conditions as are necessary in a given set of facts for effective recording of evidence (especially to ensure compliance with rule 5 (6) (d).

(13) The examination shall as far as practicable, proceed without interruption or the grant of unnecessary adjournments. However, the court or the commissioner as the case may be will be at liberty to determine whether an adjournment should be granted, and if so, on what terms.

(14) The court shall be guided by the provisions of the C.P.C. and Chapter XXIII, Part B of the Cr.P.C., the Evidence Act and the IT Act while examining a person through video conferencing.

(15) Where a Required person is not capable of reaching the Court Point or the Institutional Remote Point due to sickness or physical infirmity, or whose presence cannot be secured without undue delay or expense, the court may authorize conduct of video conferencing from the place at which such person is located. In such circumstances the court may direct the use of portable video conferencing systems. Authority on this behalf may be given to the concerned coordinator and/or any person deemed fit by the court.

    (a) If the court thinks fit, the required person may be permitted by the court to connect through video conferencing or other modes of audio-visual electronic linkage from the place of his residence or work.

(16) Subject to such orders as the court may pass, in case any party or person authorized by the party is desirous of being physically present at the Institutional Remote Point at the time of recording of the testimony, such party shall make its own arrangement for appearance/ representation at the remote point.

(17) Where the court is of opinion, for the reasons recorded that, without showing the document(s) evidence of the witness cannot be effectively recorded, may decline to examine such witness through video conferencing.

9. Exhibiting or showing documents to witness or accused at a Remote Point.-

If in the course of examination of a person at a Remote Point by video conferencing, it is necessary to show a document to the person, the Court may permit the document to be shown in the following manner:

(1) if the document is at Court Point, by transmitting a copy or image of the document to the Remote Point electronically, including by email and thereafter taking a printout of it at the Remote Point;

(2) if the document is at the Remote Point, by transmitting a copy (not editable) /image of the same to the Court Point electronically including by email. The hard copy of the document counter signed by the witness and the coordinator at the Remote Point shall be dispatched to the Court Point via authorized courier/registered speed post.

10. Ensuring seamless video conferencing.-

(1) The advocate or Required Person shall address the court by video conferencing from a specified Remote Point on the date and time specified in the order issued by the court.

(2) If the proceedings are carried out from any of the remote point(s) (in situations described in rules 5(3)(a) to 5(3)(i) the Coordinator at such Remote Point shall ensure compliance of all technical requirements, However, if the proceedings are conducted from a Remote Point falling in the situation contemplated under Rules 5 (3)(i) such as an advocate's office, the coordinator at the Court Point shall ensure compliance of all technical requirements for conducting video conferencing at both the Court Point and the remote point.

(3) The coordinator at the Court Point shall be in contact with the concerned advocate or the Required Person and guide them in regard to the fulfilment of technical and other requirements for executing a successful hearing through video conferencing. Any problem faced by such Remote User shall be resolved by the Court Point Coordinator. The Court Point Coordinator shall inter alia share the link of the video conferencing hearing with such Remote users.

(4) The coordinator at the Court Point shall ensure that any document or audio-visual files, emailed by the Remote user, are duly received at the Court Point.

(5) The coordinator at the Court Point shall also conduct a trial video conferencing preferably 30 minutes prior to scheduled video conferencing in order to ensure that all the technical system are in working condition at both the Court Point and the Remote Point.

(6) At the scheduled time, the coordinator at the Court Point shall connect the Remote User to the court.

(7) On completion of the video conferencing proceeding the court shall mention in the order sheet, the case conducted through video conferencing.

(8) The court shall also record its satisfaction as to clarity, sound and connectivity for both Court Users and Remote Users.

(9) On the completion of video conferencing, if a Remote User is of the opinion that they were prejudiced due to poor video and/or audio quality, the Remote User shall immediately inform the coordinator at the Court Point, who shall in turn, communicate this information to the court without any delay. The court shall consider the grievance and if it finds substance in the grievance may declare the hearing to be incomplete and the parties may be asked to re-connect or make a physical appearance in court.

11. Examination of accused and witnesses.-

(i) The court may, at its discretion, authorize detention (except first judicial remand and police remand) of an accused, by video conferencing or other modes of audio-visual electronic linkage.

(2) Save as otherwise provided the court may, for reasons to be recorded in writing examine a witness or frame the charges in criminal trail or examine a witness u/s 164 of Cr.P.C. or record the statement of the accused under section 313 Cr.P.C. through video conferencing while observing all due precautions to ensure that the witness or the accused as the case may be is free from any form of coercion, threat or undue influence.

(3) In plea bargaining matters, on an application from an accused not previously convicted, the court may in its discretion arrange a meeting of accused with the victim through video conferencing. The court may provide an opportunity to the pleaders of respective parties to participate in the meeting where, after the meeting, a satisfactory disposal of the case is probable, the court shall record this fact and may, in its discretion, dispose of the case on the basis of plea-bargaining, as per law.

CHAPTER IV
GENERAL PROCEDURE

12. General Procedures.-

(1 The procedures set out hereinafter in this chapter is without prejudice to the procedure indicated elsewhere in these rules *qua* specific instances in which proceedings are conducted via video conferencing.

(2) The coordinator at the Court Point shall ensure that video conferencing is conducted only through a Designated Video Conferencing Software.

However, in the event of a technical glitch, the concerned court may for reasons to be recorded permit the use of a software other than the Designated Video Conferencing Software for video conferencing in that particular proceeding.

(3) The identity of the person to be examined shall be confirmed by the court with the assistance of the coordinator at the Institutional Remote Point in accordance with Rule 8(1) at the time of recording of the evidence and the same must be reflected in the order sheet of the court.

(4) In civil cases, parties requesting for recording statements of the person to be examined by video conferencing shall confirm to the court, the location of the person, the willingness of such person to be examined through video conferencing and the availability of technical facilities for video conferencing at the agreed upon time and place.

(5) In criminal cases, where the person to be examined is a prosecution witness or a court witness or a person is to make submission for prosecution or where a person to be examined is a defence witness or a person is to make submission for defence, the counsel for the prosecution or defence counsel or the accused, as the case may be shall confirm to the court the location of the person, willingness to be examined by video conferencing and the time, place and technical facility for such video conferencing.

(6) In case the person to be examined or appeared is an accused, the prosecution/defence counsel will confirm the location of the accused at the Remote Point.

(7) If the accused is in custody and not present at the Court Point, the court will order a multi-point video conference between itself, the witness and the accused in custody to facilitate recording of the statement of the witness (including medical or other expert). The Court shall ensure that the defence of the accused is not prejudiced in any manner and that the safeguards contained in Rule 8(3) are observed.

(8) Whenever required, the coordinator at the Remote Point shall be paid such amount as honorarium as may be directed by the court in consultation with the parties.

13. Costs of Video Conferencing.-

In the absence of rules prescribed by the concerned court, the court may take into consideration following circumstances when determining and/or apportioning the costs of video conferencing :

(1) In criminal cases, the expenses of the video conferencing facility including expenses involved in preparing soft copies/certified copies of the court record and transmitting the same to the coordinator at

the Remote Point, and the fee payable to translator/interpreter/special educator, as the case may be, as also the fee payable to the coordinator at the Remote Point, shall be borne by such party as directed by the Court.

(2) In civil cases, generally, the party making the request for recording evidence, through video conferencing shall bear the expenses.

(3) Besides the above, The court may also make an order as to expenses as it considers appropriate, taking into account rules/instructions regarding payment of expenses to the complainant and witnesses, as may be prevalent from time to time.

(4) It shall be open to the Court to waive the costs as warranted in a given situation.

14. Conduct of Proceedings.-

(1) All advocates, Required Persons, the party in person and/or any other person permitted by the Court to remain physically or virtually present (hereinafter collectively referred to as participants) shall be abide by the requirement set out in Schedule-I.

(2) Before the commencement of video conferencing all participants, shall have their presence recorded. However, in case a participants is desirous that their face or name be masked, information to that effect will be furnished to the Court Point Coordinator prior to the commencement of the proceeding.

(3) The Court Point Coordinator shall send the link/meeting ID/Room Details via the email id/mobile number furnished by the advocate or Required Person or other participant permitted to be virtually present by the Court. Once the proceeding have commenced, no other persons will be permitted to participate in the virtual hearing, save and except with the permission of the court.

(4) the participants, after joining the hearing shall remain in the virtual lobby if available, until they are admitted to virtual hearing by the coordinator at the Court Point.

(5) Participation in the proceedings shall constitute consent by the participants to the proceedings being recorded by video conferencing.

(6) Establishment and disconnection of links between the Court Point and the Remote Point would be regulated by orders of the court.

(7) The court shall satisfy itself that the advocate, Required person or any other participant that the court deems necessary at the Remote Point or the Court Point can be seen and heard clearly and can clearly see and hear the court.

(8) To ensure that video conferencing is conducted seamlessly, the difficulties, if any, experienced in connectivity must be brought to the notice of the court at the earliest on the official email address and mobile number of the Court Point coordinator which has been furnished to the participant before the commencement of the virtual hearing. No complaint shall be entertained subsequently.

(9) Wherever any proceeding is carried out by the court under these rules by taking recourse to video conferencing, this shall specifically be mentioned in the order sheet.

15. Access to Legal Aid Clinics/Camps/Lok Adalats/Jails Adalats.-

(1) In conformity with the provisions of the legal Services Authorities Act, 1987 and the laws in force, in proceedings related to Legal Aid Clinics, Camps, Lok Adalats or Jail Adalats, any person who at the Remote Point is in Jail or prison shall examined by the Chairman/Secretary of the District legal Service Authority or Taluka Legal Service Committee or Members of Lok Adalats before passing any award or orders in accordance with law.

(2) Such award or order shall have the same force as if it was passed by the regular Lok Adalat or Jail Adalat.

(3) Copy of the award or order and the record of proceeding shall be sent to the Remote Point.

16. Third Parties to the case.-

(1) Third parties will be allowed to remain present during video conferencing upon a specific order being issued by the concerned court. Each court shall be guided by such general or special orders made in that regard by the Chief Justice of the High Court in exercise of their administrative jurisdiction.

(2) Where, for any reason, a person unconnected with the case is present at the Remote Point, that person shall be identified by the coordinator at the remote Point at the start of the proceedings and the purpose of the presence of that person shall be conveyed to the court. Such a person shall continue to remain present only if ordered so by the court.

CHAPTER V
MISCELLANEOUS

17. Power to Relax.-

The Chief Justice may, if satisfied that the operation of any rule is causing undue hardship, by an order dispense with or relax the requirements of the rule to such extent and subject to such conditions, as may be stipulated to deal with the case in a just and equitable manner.

18. Repeal and Savings.-

The District Court of Madhya Pradesh Video Conferencing Rules, 2018 and guidelines, if any, corresponding to these Rules, in force immediately before the commencement of these rules are hereby repealed:

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules.

19. Residual Provisions.-

Matters with respect to which no express provision has been made in these rules, shall be decided by the court consistent with principle of furthering the interest of justice.

SCHEDULE-I

1. All participants shall wear sober attire consistent with the dignity of the proceedings. Advocates shall be appropriately dressed in professional attire prescribed under the Advocates Act, 1961. Police officials shall appear in the uniform prescribed for police officials under the relevant statute or orders. The attire for judicial officers and court staff will be as specified in the relevant rules prescribed in that behalf by the High Court. The decision of the Presiding Judge or officer as to the dress code will be final.
2. The case will be called out and appearances shall be recorded on the direction of the court.
3. Every participant shall adhere to the courtesies and protocol thet arc followed in the physical court. Judges will be addressed as “Madam/Sir” or “Your Honour”. Official will be addressed by their designation such as “Reader /Execution Clerk/Court Master/Stenographer/Deposition Writer”. Advocates will be addressed as “Learned Counsel/Senior Counsel”.
4. Advocates, Required Persons, parties in person and other participants shall keep their microphones muted till such time as they are called upon to make submissions.
5. Remote Users shall ensure that their devices are free from malware.
6. Remote Users and the Coordinator at the Remote Point shall ensure that the Remote Point is situated in a quiet location, is properly secured and has sufficient internet coverage. Any unwarranted disturbance caused during video conferencing may, if the presiding Judge so directs, render the proceedings non-est.
7. All participants’ cell phones shall remain switched off or in air plane mode during the proceedings.
8. All participants should endeavour to look into the camera, remain attentive and not engage in any other activity during the course of the proceedings.

SCHEDULE-II

Request form for Video Conference

1. Case Number/CNR Number (if any)
2. Cause Title
3. Proposed Date of Conference (DD/MM/YYYY)
4. Location of the Court Point (s):
5. Location of the Remote Point (s):
6. Name & Designation of the Participants at the Remote Point: _____
7. Reasons for Video Conferencing:
   In the matter of:
8. Nature of Proceedings: Final Hearing ☐ Interim Hearing ☐
   Others ☐

I have read and understood the provisions of Rules for Video Conferencing for courts (hyperlink). I undertake to remain bound by the same to the extend applicable to me. I agree to pay video conferencing charges, if so directed by the Court.

Signature of the applicant/authorised signatory:
Date

For use of Court Point Coordinator

A) Name of the Court :
B) Hearing :
Held on (DD/MM/YYYY)
Commencement Time:
End Time :
Number of hours :
C) Costs :
Overseas transmission charges if any :
To be incurred by Applicant/Respondent :
To be shared equally :
Waived; as ordered by the Court :

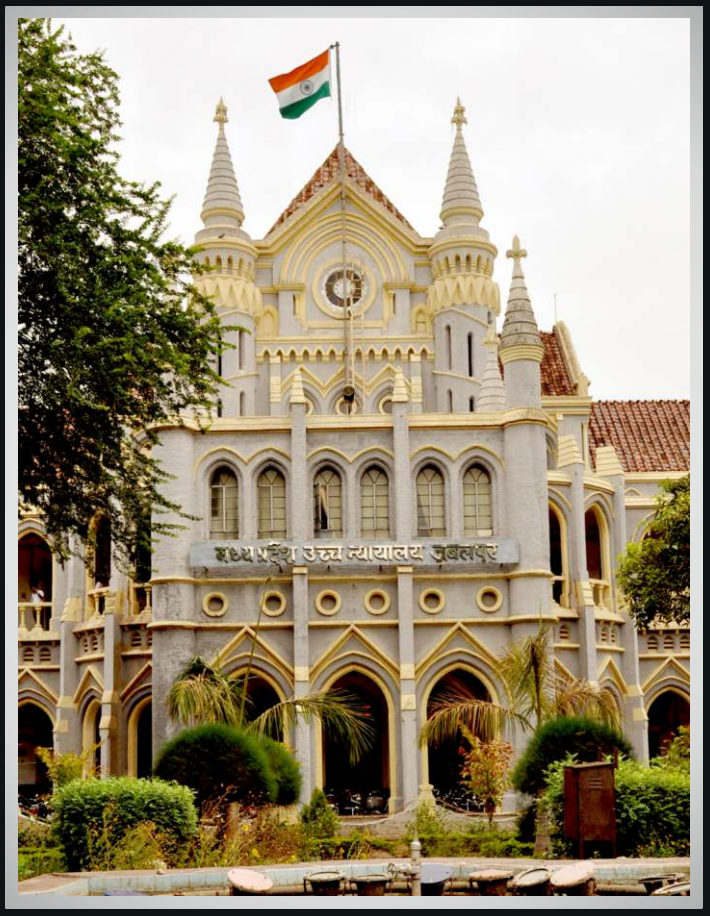
Signature of the authorised Officer :

Date

REGISTRAR GENERAL

मध्यप्रदेश उच्च न्यायालय, खण्डपीठ इन्दौर

मध्यप्रदेश उच्च न्यायालय, खण्डपीठ ग्वालियर



मध्यप्रदेश उच्च न्यायालय, जबलपुर

मध्यप्रदेश राज्य न्यायिक अकादमी

मध्यप्रदेश उच्च न्यायालय, जबलपुर - 482 007